

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2615

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
No. 74-2615

MAURICE GOLDBERG, CLAIRE GOLDBERG,
MAURICE GOLDBERG, as Custodian for
MARION GOLDBERG, BETTE GOLDBERG and
JOYCE E. GOLDBERG, under The New York
Uniform Gifts to Minors Act, and
MAURICE GOLDBERG, HENRY J. GOLDBERG
and SAMUEL M. SPRAFKIN, as Trustees
under the Trusts for the benefit of
MARION GOLDBERG, BETTE GOLDBERG and
JOYCE E. GOLDBERG,

Plaintiffs-Appellants,

- against -

ARROW ELECTRONICS, INC.,

Defendant-Appellee,

and STATE OF NEW YORK,

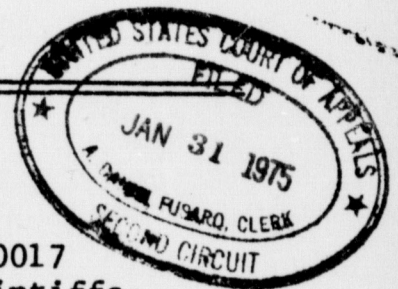
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

A P P E N D I X

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RELEVANT DOCKET ENTRIES

74C 1077

Date	Proceedings
July 22-74	Complaint filed. Summons issued.
Aug. 8-74	Answer filed. (Arrow Electronics)
Sept. 4-74	Notice of motion and memorandum of law granting summary judgment in favor of deft Arrow, ret 9-20-74 at 10 A.M. filed.
Sept. 11-74	Notice of Appearance filed.
Sept. 20-74	Affidavit in Support of Pltff's Motion for Summary Judgment and in Opposition to Deft's Motion for Summary Judgment filed.
Sept. 20-74	Notice of Motion, ret 9-27-74 filed re: striking the first, second and third affirmative defenses and the answer of deft Arrow Electronics, Inc.
Sept. 20-74	Record and Briefs in the proceedings in the N.Y. State Courts filed.
Sept. 30-74	Notice of motion and memorandum of law for an order granting summary judgment in favor of Arrow Electronics filed. (ret 10-4-74 at 10 A.M.)
Oct. 7-74	Before MISHLER, CH.J.-Case called-Motion argued-Decision reserved.
Oct. 9-74	Pltff's Supplemental Memorandum in Reply to deft's Second Memorandum filed.
Nov. 13-74	By MISHLER, CH.J.-Memorandum of Decision and Order dtd 11-13-74 denying pltff's motion for summary judgment. Deft's motion to dismiss is granted. Clerk is directed to enter judgment in favor of defts filed. (p/c to attys)
Nov. 15-74	Judgment dated 11-15-74 filed that judgment is entered in favor of defts Arrow Electronics, Inc. and State of N.Y. and against the pltffs that the complaint is dismissed. P.C. mailed to the attys.

COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MAURICE GOLDBERG, CLAIRE GOLDBERG,	:	Civil Action No.
MAURICE GOLDBERG, as Custodian for	:	74 C 1077 (JM)
MARION GOLDBERG, BETTE GOLDBERG and	:	
JOYCE E. GOLDBERG, under The New York	:	
Uniform Gifts to Minors Act, and	:	
MAURICE GOLDBERG, HENRY J. GOLDBERG	:	
and SAMUEL M. SPRAFKIN, as Trustees	:	
under the Trusts for the benefit of	:	
MARION GOLDBERG, BETTE GOLDBERG and	:	
JOYCE E. GOLDBERG,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
ARROW ELECTRONICS, INC. and	:	
STATE OF NEW YORK,	:	
	:	
Defendants.	:	

----- x

1. This action is for a declaratory judgment under the provisions of 28 U.S.C. §2201, to declare Section 623 of the Business Corporation Law of the State of New York (hereinafter referred to as "B.C.L. §623") unconstitutional in that it is in violation of and repugnant to the Fourteenth Amendment of the United States Constitution.

2. The matter in controversy involves property and rights of a value in excess of \$10,000. Jurisdiction of the court is asserted under 28 U.S.C. §1331 and 42 U.S.C. §1983.

3. At all times herein mentioned Plaintiff, MAURICE GOLDBERG, was the owner of record of 68,672 shares of the common stock of

Complaint

Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

4. At all times herein mentioned, Plaintiff, CLAIRE GOLDBERG, was the owner of record of 1,400 shares of the common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

5. At all times herein mentioned, Plaintiff, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG under the New York Uniform Gifts to Minors Act, was the owner of record of 400 shares of the common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

6. At all times herein mentioned, Plaintiff, MAURICE GOLDBERG, as Custodian for BETTE GOLDBERG under the New York Uniform Gifts to Minors Act, was the owner of record of 400 shares of common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

7. At all times herein mentioned, Plaintiff, MAURICE GOLDBERG, as Custodian for JOYCE E. GOLDBERG under the New York Uniform Gifts to Minors Act, was the owner of record of 400 shares of the common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

8. At all times herein mentioned, Plaintiffs, MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trust for the benefit of MARION GOLDBERG, were the

Complaint

owners of record of 1,200 shares of the common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

9. At all times herein mentioned, Plaintiffs, MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trust for the benefit of BETTE GOLDBERG, were the owners of record of 1,200 shares of the common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

10. At all times herein mentioned, Plaintiffs, MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trust for the benefit of JOYCE E. GOLDBERG, were the owners of record of 1,200 shares of the common stock of Defendant, ARROW ELECTRONICS, INC., of a par value of \$1.00 per share.

11. Defendant, ARROW ELECTRONICS, INC. (hereinafter referred to as "ARROW"), is a corporation duly organized and existing under the laws of the State of New York.

12. Defendant, STATE OF NEW YORK, is named as a party because Plaintiffs seek a judgment, declaring B.C.L. §623 of the State of New York to be unconstitutional.

13. All plaintiffs, except plaintiff-trustee HENRY J. GOLDBERG, are residents of Nassau County within the Eastern District of New York.

14. Defendant, ARROW, maintains places of business in Nassau County, within the Eastern District of New York.

Complaint

15. Upon information and belief, on or about May 25, 1972 the authorized capital stock of Defendant, ARROW, consisted of 2,500,000 shares of common stock, par value \$1.00 per share, and 1,000,000 shares of preferred stock, par value \$1.00 per share; 1,525,984 shares of common stock were issued and outstanding, and 175,900 shares of common stock were reserved for issuance upon the exercise of certain options and warrants.

16. On or about April 28, 1972, Defendant, ARROW, issued to its shareholders a notice of the annual meeting of its shareholders, to be held on May 25, 1972 at 2:00 p.m. o'clock at Marine Midland Bank - New York, 140 Broadway, New York, N.Y., for the purpose of, among others, considering and acting upon a proposal to change the state of incorporation of Defendant, ARROW, from New York to Delaware by merging it into a newly formed wholly owned Delaware subsidiary; and the merger, if adopted, to result in the increase of the authorized shares of common stock, par value \$1.00 per share, from 2,500,000 to 3,000,000.

17. Prior to the vote upon the matter set forth herein, Plaintiffs duly objected in writing to the aforesaid Plan and Agreement to merge Defendant, ARROW, into the newly formed wholly owned subsidiary Delaware corporation of the same name and to the increase of its authorized number of shares of common stock.

Complaint

18. Not having assented to the Plan of Merger, pursuant to New York Business Corporation Law §910, Plaintiffs acquired the right to receive payment of the value of their shares as of May 24, 1972, provided plaintiffs complied with B.C.L. §623.

19. At the annual meeting of the shareholders of Defendant, ARROW, held on May 25, 1972 at 2:00 p.m. o'clock, the shareholders adopted and approved the Plan and Agreement of Merger between Defendant, ARROW, and the Delaware corporation of the same name, in the form attached to the proxy statement providing for the merger of Defendant, ARROW, with and into the said subsidiary Delaware corporation, and for an increase in the authorized number of shares of common stock from 2,500,000 to

20. After the shareholders meeting on May 25, 1972 at which such Plan and Agreement of Merger was adopted and approved, Defendant, ARROW, gave written notice of such shareholders' authorization by registered mail to Plaintiffs.

21. After the receipt of said notice to Plaintiffs of the shareholders' authorization, in accordance with B.C.L. §623, Plaintiffs duly filed with Defendant, ARROW, written notices of their election to dissent and demanded payment of the fair value of their shares.

22. In accordance with B.C.L. §623, Plaintiffs duly submitted their share certificates to Defendant, ARROW, and the certificates were endorsed with the statutory legend. A

Complaint

transferee of any such endorsed share certificates acquires no rights, except those which a plaintiff, as an original dissenting shareholder, had after filing his notice of election to dissent.

23. In accordance with B.C.L. §623, Defendant, ARROW, offered to pay to Plaintiffs \$9.00 with respect to each share of the common stock of Defendant, ARROW, owned by Plaintiffs on May 25, 1972, conditioned, however, upon the consummation of the merger of Defendant, ARROW, with and into ARROW ELECTRONICS, INC., the Delaware Corporation. However, Plaintiffs and Defendant, ARROW, failed to agree, within the statutory period after the making of the offer, upon the price to be paid for the shares of Plaintiffs in Defendant, ARROW. Said statutory 30-day period expired on or about September 17, 1972.

24. Defendant, ARROW, had 20 days after the expiration of the aforesaid statutory period within which to institute a special proceeding in the Supreme Court of the State of New York, to determine the rights of Plaintiffs and to fix the fair value of their shares. Defendant, ARROW, failed to institute such proceeding and the 20-day period within which the proceeding was to have been instituted by Defendant, ARROW, expired. Subsequent to the expiration of the aforesaid

Complaint

statutory 20-day period and within 30 days, Plaintiffs, in accordance with B.C.L. §623, duly instituted such special proceeding on or about October 12, 1972, returnable October 26, 1972.

25. The Supreme Court of the State of New York denied Plaintiffs' application on January 4, 1973, without prejudice to renewal because of a representation made to the Court by Defendant, ARROW, that it was negotiating a loan to obtain sufficient funds and thus consummate the merger.

26. On February 2, 1973, Defendant, ARROW, notified Plaintiffs that on January 31, 1973 its Board of Directors abandoned the merger.

27. On or about February 19, 1973, Defendant, ARROW, issued new share certificates to Plaintiffs to replace the share certificates with the statutory legend.

28. On May 24, 1972, which is the day prior to the shareholders' authorization of the merger, known as the valuation day for dissenters' shares, the shares of Defendant, ARROW, were traded on the American Stock Exchange at a high of \$10.375 and a low of \$10.00; and upon information and belief, the value of each such share was \$12.00.

29. When Defendant, ARROW, notified Plaintiffs of the abandonment of the merger and that their share certificates with the endorsed statutory legend may be exchanged for new

Complaint

share certificates without such legend, the shares of Defendant, ARROW, were traded on the American Stock Exchange at \$8.375; and upon information and belief, the value of each such share had declined to about \$8.375.

30. When the new share certificates were issued and delivered by Defendant, ARROW, to Plaintiffs, the shares of Defendant, ARROW, were traded on the American Stock Exchange at \$8.375.

31. By notice of motion dated February 12, 1973, Plaintiffs also applied to the New York State Supreme Court for an award of damages, counsel fees, expenses, costs and disbursements.

32. The Appellate Division of the Supreme Court of the State of New York held that upon abandonment of the merger, B.C.L. §623 afforded no relief to dissenting shareholders and denied Plaintiffs' applications for payment of the value of their shares, damages, counsel fees, expenses, costs and disbursements.

33. Plaintiffs requested the Appellate Division to reconsider, because B.C.L. §623, as so interpreted, is unconstitutional, in that it deprived Plaintiffs of their property and rights without due process, in violation of and repugnant to the Fourteenth Amendment. The Appellate Division refused to reconsider. It also denied Plaintiffs

Complaint

leave to appeal to the Court of Appeals of the State of New York.

34. Plaintiffs previously had appealed to the Court of Appeals of the State of New York, as a matter of right from the orders of the Appellate Division, seeking to bring up for review the constitutionality of B.C.L. §623 as interpreted by the Appellate Division. The Court of Appeals held that Plaintiffs had no right to appeal as a matter of right, and dismissed the appeal. Plaintiffs thereafter requested the Court of Appeals of the State of New York for permission to appeal and, in such application, requested the Court to consider the constitutionality of B.C.L. §623, as construed by the Appellate Division. The New York Court of Appeals refused to consider the question of the constitutionality of the statute and declined Plaintiffs' application for leave to appeal.

35. Plaintiffs have exhausted all available state procedures.

36. Plaintiffs, as nonassenting shareholders, had the right to receive from Defendant, ARROW, payment of the value of their shares. This right was subject to their compliance with B.C.L. §623. They duly complied with all of the statutory conditions on their part to be performed. Upon Defendant, ARROW's, unilateral act of abandoning the merger, B.C.L. §623

Complaint

automatically deprived Plaintiffs of the right to receive payment of the value of their shares. Restoration to shareholder status more than 8 months later was no substitute for payment of share value. Plaintiffs were not restored to the position they were in more than 8 months earlier. Their shares had declined in value. Their shares could not be traded on the American Stock Exchange during the period of more than 8 months. Furthermore, during this period, Plaintiffs had been deprived of their shares and their value.

37. B.C.L. §623 deprived Plaintiffs of their property, rights and remedies, without due process, in violation of and repugnant to the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiff demands judgment

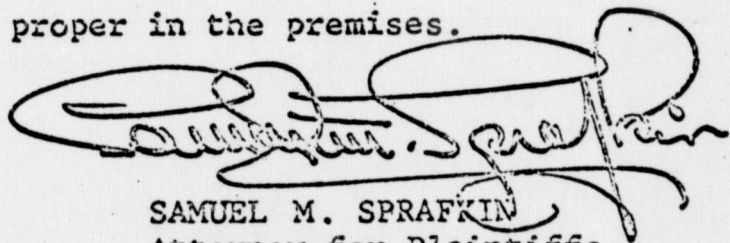
1. Declaring that B.C.L. §623 is unconstitutional: in that it deprived Plaintiffs, as nonassenting shareholders, of their right to receive from Defendant, ARROW, payment of the value of their shares when Defendant, ARROW, unilaterally abandoned the merger; in that it deprived Plaintiffs of their property for more than 8 months; in that it deprived Plaintiffs of the right to trade their shares on the American Stock Exchange for more than 8 months; in that it deprived Plaintiffs of the right to be compensated for the damages sustained by reason of the decline in the value of their shares during the

Complaint

period of more than 8 months; in that it deprived Plaintiffs of the right to be compensated for costs and expenses, including attorneys fees, of the judicial valuation proceeding which Plaintiffs were compelled to commence; all without due process.

2. That Plaintiffs recover of Defendant, ARROW, the value of their shares as of May 24, 1972, with interest from May 24, 1972, and attorneys fees, expenses, costs and disbursements; or, in the alternative, a sum equal to the difference in value of Plaintiffs' shares from May 24, 1972 to February 19, 1973, together with interest from May 24, 1972, expenses, attorneys fees, costs and disbursements.

3. That Plaintiffs recover and have such other and further relief as may be just and proper in the premises.



SAMUEL M. SPRAFKIN
Attorney for Plaintiffs
230 Park Avenue
New York, N.Y. 10017
Tel. (212) 689-2580

ANSWER

(Same Caption)

Defendant Arrow Electronics, Inc. ("Arrow") by its attorneys, Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, answers the complaint as follows:

First: Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1, 2, 12, 13 and 30 of the complaint.

Second: Admits the allegations of paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 19, 20, 26 and 27 of the complaint.

Third: Denies the allegations of paragraph 18 of the complaint, except admits that New York Business Corporation Law ("BCL") §623 affords dissenting shareholders the right to an appraisal of their securities in certain circumstances.

Fourth: Denies the allegations of paragraph 21 of the complaint, except admits that plaintiffs submitted to defendant written notices of their election to dissent and demanded payment for their Arrow common stock.

Fifth: Denies the allegations of paragraph 22 of the complaint, except admits that plaintiffs submitted

Answer

certain stock certificates to Arrow and that such certificates were endorsed with a legend.

Sixth: Denies the allegations of paragraph 23 of the complaint, except admits that Arrow offered to pay plaintiffs \$9.00 per share for their Arrow common stock; that such offer was conditioned upon consummation of the merger of Arrow with a. into a Delaware corporation of the same name; that plaintiffs and Arrow did not agree upon a price to be paid for the plaintiffs' Arrow common stock; and that one of the statutory periods set forth in BCL §623 expired on or about September 17, 1972.

Seventh: Denies the allegations of paragraph 24 of the complaint, except admits that defendant did not institute a proceeding in the Supreme Court of the State of New York to determine the rights of plaintiffs; that plaintiffs instituted such a proceeding on or about October 12, 1972, returnable October 26, 1972; and that the institution of such proceeding was accomplished within the time provided by BCL §623.

Eighth: Denies the allegations of paragraph 25 of the complaint, except admits that the Supreme Court of the State of New York denied plaintiffs' application for an appraisal of their shares on or about January 4, 1973.

Answer

Ninth: Denies the allegations of paragraph 28 of the complaint, except admits that on May 24, 1972 the common stock of Arrow was traded on the American Stock Exchange at a high of \$10.375 per share and a low of \$10.00 per share.

Tenth: Denies the allegations of paragraph 29 of the complaint, except admits that on or about February 19, 1973 the common stock of Arrow was traded on the American Stock Exchange at approximately \$8.375 per share and denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of such paragraph that the value of Arrow common stock at such date had declined to about \$8.375 per share.

Eleventh: Denies the allegations of paragraph 31 of the complaint, except admits that by notice of motion dated February 12, 1973 plaintiffs applied to the Supreme Court of the State of New York for certain relief.

Twelfth: Denies the allegations of paragraph 32 of the complaint, and refers to the decision and order of the Appellate Division of the Supreme Court of the State of New York, First Department, dated September 20, 1973, for the full and correct terms thereof.

Answer

Thirteenth: Denies the allegations of paragraph 33 of the complaint, except admits that plaintiffs requested that the Appellate Division of the Supreme Court of the State of New York, First Department, grant reargument of its decision and order of September 20, 1973; that, in requesting reargument, plaintiffs contended that BCL §623, as interpreted by the Appellate Division, was unconstitutional; that the Appellate Division, by order dated March 21, 1974, denied plaintiffs' application for reargument; and that in the same order the Appellate Division also denied plaintiffs' motion for leave to appeal to the Court of Appeals of New York.

Fourteenth: Denies the allegations of paragraph 34 of the complaint, except admits that plaintiffs appealed to the Court of Appeals of New York from the above referred to orders of the Appellate Division; that such appeal was dismissed by the Court of Appeals of New York for lack of jurisdiction; that in their brief upon such appeal plaintiffs challenged the constitutionality of BCL §623 as interpreted by the Appellate Division; that, subsequent to the dismissal of their appeal taken as of right, plaintiffs moved in the Court of Appeals of New York for leave to appeal to such court and, in their motion papers, again challenged the constitutionality of BCL §623 as applied to them; and that

Answer

the Court of Appeals denied plaintiffs' application for leave to appeal.

Fifteenth: Denies the allegations of paragraph 35 of the complaint, except admits that in the suit brought by them in the New York State courts plaintiffs took the procedural steps referred to in the preceding paragraphs of this answer.

Sixteenth: Denies the allegations of paragraph 36 of the complaint, except admits that plaintiffs complied with certain statutory preconditions to their right to an appraisal of their Arrow common stock; and that upon Arrow's abandonment of its proposed merger plaintiffs were not entitled to an appraisal of their stock.

Seventeenth: Denies the allegations of paragraph 37 of the complaint.

First Affirmative Defense

Eighteenth: The Court lacks jurisdiction over the subject matter.

Second Affirmative Defense

Nineteenth: The assertion of the claims alleged in

Answer

the complaint is barred by res judicata, since such claims were litigated and decided adversely to plaintiffs in a special proceeding in the Supreme Court of the State of New York, New York County, entitled In the Matter of the Application of Maurice Goldberg, individually and as Custodian for Marion Goldberg, Bette Goldberg and Joyce E. Goldberg under The New York Uniform Gifts to Minors Act, and Maurice Goldberg, Henry J. Goldberg, and Samuel M. Sprafkin as Trustees under the Trusts for the benefit of Marion Goldberg, Bette Goldberg and Joyce E. Goldberg and Claire Goldberg, Petitioners, to determine their rights as dissenting shareholders, and to fix and recover the fair value of their shares in and from Arrow Electronics, Inc., Respondent, under Section 623 of the Business Corporation Law, Index No. 22146/72.

Third Affirmative Defense

Twentieth: The complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant Arrow Electronics, Inc. demands judgment dismissing the complaint against it, together with the costs and disbursements of this action.

New York, New York
August 8, 1974

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll
/s/ Geoffrey Kalmus
Attorney for Defendant
Arrow Electronics, Inc.

NOTICE OF MOTION OF DEFENDANT ARROW

(Same Caption)

Please take notice that, upon the annexed affidavit of Geoffrey M. Kalmus, sworn to September 3, 1974, and the exhibits thereto, and upon the prior proceedings had herein, the undersigned will move this Court, before Chief Judge Jacob Mishler, in Courtroom 5, United States Courthouse, Cadman Plaza, Brooklyn, New York, on September 20, 1974, at 10 A.M., or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment to defendant Arrow Electronics, Inc. upon the ground that the claim asserted in plaintiffs' complaint is barred by res judicata by reason of the prior judgment in the proceeding entitled Goldberg v. Arrow Electronics, Inc., Supreme Court, New York County, Index No. 22146/72, aff'd in part and rev'd in part, 42 A.D. 2d 890 (1st Dep't 1973), appeal dismissed, 33 N.Y. 2d 1004, leave to appeal denied, 34 N.Y. 2d 515 (1974).

New York, New York
September 3, 1974

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll
/s/ Geoffrey Kalmus
Attorneys for Defendant
Arrow Electronics, Inc.

To:
Samuel M. Sprafkin, Esq.
Attorney for Plaintiffs

Hon. Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendant

KALMUS AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION

(Same Caption)

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Geoffrey M. Kalmus, being duly sworn, deposes and
says:

1. I am a member of the firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for defendant Arrow Electronics, Inc. ("Arrow"). I make this affidavit in support of Arrow's motion for summary judgment on the ground that plaintiffs' claim is barred by the doctrine of res judicata. Arrow is also submitting a memorandum of law in support of its motion.

A summary of Ar-
row's position

2. Plaintiffs are stockholders of Arrow who dissented from a merger proposed by Arrow in the spring of 1972 but abandoned early in 1973 before consummation. In a prior appraisal proceeding brought by the same plaintiffs in the New York Supreme Court under New York Business Corporation Law §623 ("BCL §623"), the court held that, since the merger was never consummated, plaintiffs were not entitled

Kalmus Affidavit in Support of Defendant's Motion

to an appraisal of their shares or to any award of interest or expenses in connection with the appraisal proceeding.

Goldberg v. Arrow Electronics, Inc., Supreme Court, New York County, Index No. 22146/72 (the "state action").* Now, in this action, plaintiffs seek the same relief denied them in the state action on the same facts alleged in the state action, arguing that the failure of BCL §623 to afford them relief renders the statute unconstitutional.

3. In this affidavit I will show that the doctrine of res judicata bars relitigation here of the claims alleged and decided in the state action. As I will point out, in the state action, plaintiffs unsuccessfully argued to the Appellate Division and the Court of Appeals the very same constitutional theory they seek to raise here. Moreover, had they wished to rely upon their constitutional claim at the trial court level in the state court, they could and should have presented it at that time. In sum, plaintiffs seek in this Court an impermissible collateral review of the state judgment, which they chose not to take to the

* The decisions in the Supreme Court were not reported. The opinion of the Appellate Division, First Department, is at 42 A.D. 2d 890. The New York Court of Appeals' order dismissing the Goldbergs' appeal as of right for lack of jurisdiction is reported at 33 N.Y. 2d 1004. Finally, the Court of Appeals' denial of leave to appeal is at 34 N.Y. 2d 515.

Kalmus Affidavit in Support of Defendant's Motion

United States Supreme Court. The doctrine of res judicata bars this attempt to harass Arrow through repetitive and piecemeal litigation.

Facts(a) The proposed merger

4. Arrow is a New York corporation engaged in the distribution and sale of electrical and electronic parts and in other businesses. Its common stock is listed and traded on the American Stock Exchange.

5. Plaintiff Maurice Goldberg, who at one time was president of Arrow, together with the other plaintiffs who are members of his family and family trusts (the "Goldbergs"), in the aggregate hold a block of approximately 75,000 shares out of the 1,500,000 shares of Arrow common stock outstanding.

6. In the spring of 1972 the management of Arrow proposed to its stockholders that Arrow change its state of incorporation from New York to Delaware through its merger into a newly created Delaware subsidiary of the same name. The merger agreement provided for its abandonment by Arrow or by the Delaware subsidiary -- even after stockholder approval -- at any time prior to its effective date,

Kalmus Affidavit in Support of Defendant's Motion

which was defined as the date that the merger agreement was filed with the Secretary of State of Delaware.

7. The proposed merger would have had no material effect on Arrow's business. It would simply have given the company the benefit of the slightly more liberal provisions of Delaware law applicable to corporations. The merger was approved overwhelmingly by Arrow's shareholders at its May 25, 1972 annual meeting. However, the Goldbergs, alone among the some 1,500 shareholders of Arrow at the time, objected to the merger and subsequently filed a notice of election to invoke the rights accorded dissenting share-

(b) BCL §623

8. BCL §623 is a comprehensive statutory scheme governing the rights of shareholders of New York corporations who dissent from such corporate actions as a merger. These dissenting shareholders, if they file timely objection to the merger and a notice of election under BCL §623, and if the merger is consummated, become entitled to payment of the fair value of their shares on the day before approval of the action by the shareholders (BCL §623(h)(4)), here, May 24, 1972. If the corporation and the dissenting shareholders are unable to reach agreement on fair value, it

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may be fixed in a special proceeding in the Supreme Court brought by either the corporation or the dissenters (BCL §623(h)). If the court enters a final order awarding the dissenters payment for their shares, the order must, subject to limited exceptions, include an award of interest from the date the shareholders authorized the action (the "shareholder authorization date") to the date of payment and may also include the costs and expenses of the special proceeding (BCL §623(h)(6)(7)). The court has discretion, again in the case of a final order, also to award the dissenters counsel fees (§623(h)(7)).

9. BCL §623 on its face makes explicit that dissenting shareholders are not entitled to payment for their shares, nor to payment of the interest, costs, expenses and counsel fees in connection with any special proceeding, if the corporate action from which they dissent is never consummated. The operative language is this:

"If.... the proposed corporate action is abandoned or rescinded ... [the shareholder] ... shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election, including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution" BCL §623(e).

Thus, although the corporation must make an offer to purchase the dissenter's shares within ninety days after the

Kalmus Affidavit in Support of Defendant's Motion

stockholders authorize the action, this offer "may be conditioned upon the consummation of such action." (BCL §623(g)).

10. Arrow, although it was seriously considering abandoning the merger in light of the Goldbergs' dissent, on August 18 duly made an offer to purchase the Goldberg stock at a price of \$9 per share, expressly conditioning the offer on consummation of the merger.

(c) The Goldbergs' first
state application

11. The Goldbergs did not agree to Arrow's conditional offer of \$9 per share. Rather, on October 12, 1972, they started a special proceeding pursuant to BCL §623 to determine the value of their shares. A copy of their notice of petition and petition is annexed to this affidavit as Exhibit A. The petition sought an order directing payment to the Goldbergs for the value of their shares, as fixed by the court, together with the costs and expenses of the proceeding.

12. Arrow opposed the petition, citing the clear wording of the statute that no payment for the Goldbergs' shares was appropriate unless and until the merger was actually consummated. In its opposing affidavit, Arrow explained to

Kalmus Affidavit in Support of Defendant's Motion

the court that it was seriously considering abandoning the merger because of the heavy burden upon Arrow's financial resources which payment for the Goldbergs' shares, even at the \$9 offer price, would impose. A copy of Arrow's affidavit in the state action is annexed as Exhibit B.

13. On January 4, 1973 Justice Murtagh denied the Goldbergs' application in the order and opinion annexed to this affidavit as Exhibit C. Justice Murtagh pointed out that Arrow was "seriously considering abandoning" the merger and construed BCL §623 as follows:

"If the proposed action is abandoned or rescinded, the shareholders will not have the right to receive payment for their shares" (Exh. C, p. 1).

Justice Murtagh's order was without prejudice to a renewal of the petition if either the merger was consummated or Arrow delayed beyond a reasonable time in determining whether to go forward with the merger.

(d) Arrow abandons
the merger

14. On January 31, 1973 Arrow's board of directors adopted resolutions formally abandoning the planned merger. The Goldbergs' counsel was informed of the decision to abandon the merger by my letter of February 2, a copy of which is annexed to this affidavit as Exhibit D.

Kalmus Affidavit in Support of Defendant's Motion

The decision to abandon the merger, by the express terms of BCL §623(e), "reinstated" the Goldbergs "to all [their] ... rights as ... shareholder[s] as of the filing of [their] ... notice of election."*

- (e) The Goldbergs' second state application for interest and expenses

15. The Goldbergs were not satisfied. On February 12, 1973 they moved for an order adjudicating that the merger had been abandoned -- an idle request since Arrow had so announced -- and awarding them \$52,068.69 "for their costs, expenses and damages, inclusive of counsel fees." Their notice of motion and supporting affidavit are annexed to this affidavit as Exhibit E. The moving affidavit (p. 6) further articulated the claim as one for, in addition to costs and expenses, either "damages" or interest on the value of the shares from the shareholders' authorization date to the date the merger was abandoned. No claim was made for payment of the value of the Goldbergs' shares.

16. The Goldbergs' memorandum submitted in support

*

The Goldbergs' stock certificates, which had been endorsed with a legend reciting their notice of election at the time they dissented, were replaced by unlegended certificates.

Kalmus Affidavit in Support of Defendant's Motion

of their motion is annexed to this affidavit as Exhibit F. The Goldbergs premised their motion principally not on BCL §623 but rather on the grounds of "simple justice" and "equity" (Exh. F, pp. 10, 13), seemingly recognizing that BCL §623 afforded them no further relief after abandonment of the merger. Their papers thus were full of talk of bad faith on Arrow's part and of the dictates of fairness. But, conspicuously omitted was any claim that BCL §623 was unconstitutional, as interpreted by Justice Murtagh to preclude the award of relief to dissenting shareholders upon abandonment of the merger.

17. In opposition to the motion we documented the bona fides of Arrow's proposal and ultimate abandonment of the merger and pointed out that there simply was no statutory authority for any of the relief sought by the motion, nor any equitable reason why it should be awarded.

18. On March 28, 1973 Justice Chimera ruled on the motion in the order and opinion annexed to this affidavit as Exhibit G. He held that there was no basis for the award of the interest or damages sought by the Goldbergs under BCL §623 and found that they had not established any equitable cause of action for such an award. However, he did award the Goldbergs counsel fees, in an amount to

Kalmus Affidavit in Support of Defendant's Motion

be set by a referee, finding authority for the award in BCL §623 (h)(7)).

(f) The appeals to the
Appellate Division

19. The Goldbergs and Arrow each appealed from the portions of Justice Chimera's order adverse to them.* Moreover, the Goldbergs had previously noticed an appeal from Justice Murtagh's decision denying their original petition as premature. In their briefs, both as appellants and appellees, the Goldbergs again made no claim that BCL §623 was unconstitutional either (i) as interpreted by Justice Murtagh to deny them payment for their shares; (ii) as interpreted by Justice Chimera to deny them all other relief except counsel fees; or (iii) as argued by Arrow on its cross-appeal with respect to the allowance of counsel fees. They relied solely on state law arguments.

20. All of the appeals were decided by the Appellate Division on September 20, 1973 by the orders and opinion annexed to this affidavit as Exhibit H. The court sustained Arrow's position in all respects. It affirmed Justice

* Justice Chimera denied motions for reargument by both the Goldbergs and Arrow.

Kalmus Affidavit in Support of Defendant's Motion

Murtagh's ruling, affirmed that portion of Justice Chimera's order denying petitioners' motion for expenses and interest or damages, and reversed Justice Chimera's award of counsel fees to the Goldbergs, finding no authorization for such an award in BCL §623(h)(7)).

(g) The Goldbergs raise their constitutional theory

21. On October 18, 1973 the Goldbergs filed a notice of appeal as of right to the Court of Appeals from the Appellate Division's orders of September 20. Here, for the first time, they asserted their constitutional claim; in their notice of appeal, annexed to this affidavit as Exhibit I, they claimed that BCL §623 "as construed by the Appellate Division, is unconstitutional." But, while this constitutional claim satisfied one requirement under CPLR §5601 for an appeal as of right, the Goldbergs overlooked another requirement, i.e., that the order appealed from be one that "finally determines the action." CPLR §5601(b).1. Thus, on the motion of Arrow, the Court of Appeals dismissed the appeal on February 15, 1974.

22. Because of their procedural error, the Goldbergs did not succeed in securing a hearing on the merits of their constitutional claim until February 22, 1974, when they

Kalmus Affidavit in Support of Defendant's Motion

moved in the Appellate Division for reconsideration of its orders of September 20, or, in the alternative, for leave to appeal to the Court of Appeals. In their notice of motion, affidavit and brief in support of the motion, annexed to this affidavit as Exhibit J, the Goldbergs posed their constitutional theory in the form of this question:

"As interpreted by the Appellate Division, is Business Corporation Law §623 unconstitutional since, upon abandonment of a corporate merger during the judicial appraisal proceeding, it deprives dissenting shareholders of their rights to receive payment of the value of their shares, and upon reinstatement to shareholder status, the dissenting shareholders were not restored to the position in which they had not been because their shares had declined in value in the interim and, during that period of time, they were deprived of their property?" (Exh. J., pp. 7-8).

(h) The frivolous nature of
the constitutional theory

23. The Goldbergs' constitutional theory -- the same one they advance in this Court -- was developed, as fully as its untenable nature permitted, in their papers submitted to the Appellate Division. It is to the merits of this constitutional theory -- although technically irrelevant to this motion -- that I now briefly turn.

24. The Goldbergs' constitutional claim is that, when Arrow abandoned the merger, BCL §623 deprived them

Kalmus Affidavit in Support of Defendant's Motion

of the "right" to receive the fair value of their shares, and ancillary interest, costs and expenses, which right BCL §623 had previously vested in them. Since this "right" was taken away without a hearing, merely by operation of law the Goldbergs claim BCL §623 offends the due process requirement that "notice and an opportunity for a hearing" be afforded "before a person is deprived of a property right," citing such cases as Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (Exh. J., pp. 22-25).

25. The citations to the Sniadach line of procedural due process cases are surely misfounded, for the Goldbergs' real grievance is not one of procedure. A hearing would have served no purpose except to elicit a judicial determination -- such as was rendered in the state action -- that, indeed, BCL §623 afforded the Goldbergs no right to the relief they sought. The Goldbergs' real claim is a substantive one: that the Constitution entitled them to the appraisal and expense award provided by BCL §623(e) free from the statutory condition that the merger be consummated.

26. This substantive theory was and is frivolous. The "right" the Goldbergs claim to have been deprived of by BCL §623 is a purely statutory one created by the very

Kalmus Affidavit in Support of Defendant's Motion

same BCL §623. That statute, in creating the right, expressly subjects it to the condition that the merger not be abandoned. The Goldbergs made a voluntary and conscious decision to dissent from the merger and invoke the provisions of BCL §623. They knew from the express language of BCL §623 that they would not be entitled to a monetary award if the merger was abandoned, and cannot now fairly complain of that condition. In creating a statutory right for dissenting shareholders, the Legislature surely was entitled to impose reasonable conditions upon that right.

27. It should be noted that any damage suffered by the Goldbergs -- as a result of their own decision to dissent -- was de minimus. During the pendency of the merger they remained free to sell their shares, the transferee taking title subject to the notice of election. BCL §623(f). They also remained free to remove any practical restriction on the saleability of their shares by withdrawing their notice of election at any time prior to Arrow's offer of August 18. BCL §623(e). Even thereafter, the Goldbergs could have requested Arrow's consent to withdrawal of the notice, BCL §623(e), which consent surely would have been granted in view of the financial obstacle that the notice posed to the merger (see ¶¶10-12, supra). They chose not to withdraw their notice, presumably realizing they could

Kalmus Affidavit in Support of Defendant's Motion

not dispose of their substantial shareholding in any event without severely depressing the prevailing market price of Arrow stock.

- (i). The state courts reject
the constitutional theory

28. Arrow made the above arguments to the Appellate Division in the affidavit annexed to this affidavit as Exhibit K. We argued that the motion for reconsideration was untimely, but, on the portion of the motion seeking leave to appeal, the merits of the constitutional issue were joined. On March 21, 1974 the Appellate Division denied, without opinion, both the motion for reargument and that seeking leave to appeal.

29. The Goldbergs next sought leave to appeal to the Court of Appeals from that court itself. Their brief to the Court of Appeals is annexed to this affidavit as Exhibit L. Again, they raised and fully briefed their constitutional theory of recovery (Exh. L, pp. 47-49), noting that the Appellate Division "presumably" rejected it in denying leave to appeal (Exh. L, p. 31). The Court of Appeals found no more merit in the theory than had the Appellate Division. It denied leave to appeal on May 1, 1974 in the order annexed to this affidavit as Exhibit M.

Kalmus Affidavit in Support of Defendant's Motion(j) This action

30. The Goldbergs did not, as they could have, seek review of the final decision of the Court of Appeals from the United States Supreme Court. Instead, they commenced this action by filing the complaint annexed to this affidavit as Exhibit N.*

Res judicata bars the complaint as against Arrow

31. Res judicata bars the assertion of a cause of action which is identical in substance to one previously adjudicated (memorandum pp. 14-19).** The claim the Goldbergs assert against Arrow in this action is identical in substance to that in their earlier state action with respect to the facts it alleges, the relief it seeks from Arrow, and the constitutional theory of recovery it advances. The Goldbergs have attempted to change the form of their action by casting it in the guise of a declaratory judgment and civil

* Arrow's answer, in addition to various denials, sets up several affirmative defenses, one of which is the claim of res judicata on which this motion is based.

** This and the similar references below are to Arrow's accompanying legal memorandum, which sets out the legal authorities pertinent to the application of the doctrine of res judicata to the case at hand.

Kalmus Affidavit in Support of Defendant's Motion

rights action under 28 U.S.C. §1983 and 28 U.S.C. §2201.

But this change in form cannot mask the identity in substance between the two causes of action.

- (a) The facts have
not changed

32. A comparison of the Goldbergs' federal complaint (Exh. N) with their original state petition (Exh. A) and their notice of motion after abandonment of the merger (Exh. E) shows that the facts alleged in this action are identical to those asserted in the state action. The alleged wrong by Arrow in each action is identical: the proposal and then the abandonment of the merger and the alleged damage these decisions caused the Goldbergs. When the facts and proof necessary to support two causes of action are identical, then, for the purpose of applying the res judicata doctrine, those two causes of action are identical under New York law (memorandum pp. 14-16).

- (b) The relief sought from
Arrow has not changed

33. Another test for determining the identity between two causes of action is whether they seek identical forms of relief (memorandum pp. 17-18). Here, again the identity between the Goldbergs' state action and this action is

Kalmus Affidavit in Support of Defendant's Motion

complete: the relief the Goldbergs seek in their federal complaint against Arrow is that which they sought and were denied in the state action.

34. In their original state petition the Goldbergs sought payment for their shares together with interest and their costs and expenses. In their motion after abandonment of the merger the Goldbergs sought again costs and expenses, including counsel fees, and, in addition, either "damages or interest" rather than payment for their shares (see ¶¶11, 15, supra). In their complaint here the Goldbergs return to their original claim for payment for their shares with interest, or, in the alternative, damages, and again seek attorneys' fees, expenses, costs and disbursements (Exh. N, p. 10).

35. The only relief sought by the complaint which was not sought in the state action is a declaratory judgment that BCL §623 is unconstitutional (Exh. N, pp. 9-10). But this relief is sought against the State of New York, not against Arrow, and, indeed, requests no more than an advisory opinion when viewed apart from the basic claim for a monetary award from Arrow. The prayer for a declaratory judgment is no more than window dressing intended to lend a novel visage to what is in substance a cause of

Kalmus Affidavit in Support of Defendant's Motion

action identical to the one perviously rejected by the state courts.

(c) The constitutional theory has not changed

36. Although it would not have helped the Goldbergs to avoid the bar of res judicata merely to have changed the legal theory of their cause of action (memorandum p..18), in fact they have not even done this. Their constitutional theory of recovery embodied in the present complaint (Exh. N, ¶¶36-37) is the same one they advanced in the Appellate Division and in the Court of Appeals in the state action (see Exh. L, pp. 47-49). The decision by those two courts in denying leave to appeal and the Goldbergs' failure to seek review of the judgment in the United States Supreme Court bars their attempt to again assert the theory in this Court (memorandum p. 20-29).

Res judicata would bar this action even had the constitutional theory not been raised in the state action

37. The Goldbergs may argue that their constitutional theory of recovery was raised so late in the state action that it did not receive a full hearing from the state courts. Res judicata, however, bars not only the relitigation of

Kalmus Affidavit in Support of Defendant's Motion

issues actually adjudicated in the prior action but also those issues that could have been adjudicated. Many are the decisions barring the attempted assertion in federal court of constitutional claims which could have been, but never were, raised in an earlier state action (memorandum pp. 21-29).

38. The absence of a full adjudication of the Goldbergs' constitutional theory in the state action was a product of their own delay in raising it. They could have argued their theory at least as early as their February 12, 1973 motion before Justice Chimera, for, it was raised by the facts at that point in time, when applied to the clear wording of BCL §623. Likewise, the law on which they later based the theory -- the line of cases begun by Sniadach in 1969 -- had been articulated. Instead of the Constitution, however, they argued equity (see ¶16, supra).

39. It was the Goldbergs' own tactical decision to premise their motion before Justice Chimera on grounds of equity rather than on the Constitution. It was also their choice not to argue their constitutional theory either on their initial appeal to the Appellate Division from Justice Chimera's decision denying them all relief except counsel fees, or in opposition to Arrow's cross-appeal for the award of counsel fees (see ¶19, supra). They

Kalmus Affidavit in Support of Defendant's Motion

chose to raise their constitutional theory when it offered the hope -- a mistaken one -- of an appeal as of right to the Court of Appeals (see ¶21, supra).

40. Thus, the Goldbergs had every opportunity in the state courts to litigate their constitutional theory. To the extent they failed to do so, it was by their own decision to ignore the Constitution until late in the game.

Arrow's right to rest secure in the state judgment

41. Fundamental to the doctrine of res judicata is the right of a successful litigant to have undisturbed by a later action the rights and interests established in the prior adjudication. Arrow is entitled to that protection here against the attempt of the Goldbergs, perhaps acting out of some grudge against Arrow's current management, to subject Arrow to repetitious litigation despite the state judgment.*

* Subsequent to the time that Arrow's present management was initially elected to office, Mr. Goldberg, the company's prior chief executive, was indicted -- and pled guilty -- to a state criminal charge relating to the receipt of a kickback in connection with relocation expenses incurred by Arrow at the time of erection of the World Trade Center in downtown Manhattan. Since the happening of that event Mr. Goldberg seems to feel aggrieved at present management.

Kalmus Affidavit in Support of Defendant's Motion

42. The state courts have settled that the proposal and later abandonment of the merger by Arrow does not entitle the Goldbergs to a monetary award from Arrow, either under BCL §623, in equity, or as a matter of constitutional right. No judgment entered in this action in the Goldbergs' favor could do other than destroy or impair the rights and interests of Arrow as found in the state action.

Res judicata bars the Goldbergs from again stirring up this controversy once settled (memorandum p. 18-19).

Res judicata
and federalism

43. The Goldbergs may have thought that their complaint would be less subject to a res judicata defense if presented as a "civil rights" action under 28 U.S.C. §1983, notwithstanding their previous characterization of their claim as relating to a "property right." (see ¶24, supra). However, federal courts long ago determined that the civil rights statutes could not be used by disappointed state litigants as a means of securing collateral review of state court judgments which determined, or would have determined upon submission of the issue by plaintiffs, the constitutionality of state statutes (memorandum, pp. 30-32).

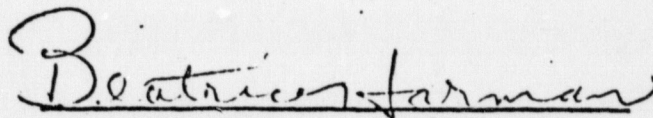
Kalmus Affidavit in Support of Defendant's Motion

44. The state courts no less than the federal courts .. are the guardians of the Goldbergs' federal constitutional rights. It was to those state courts that the Goldbergs were obligated to submit any constitutional claim directed against BCL §623,, subject to the right to seek review by the Supreme Court of any adverse decision. Their failure to present their constitutional theory earlier in the state action and their failure to seek review by the Supreme Court from the ultimate rejection of their constitutional theory provides no basis for collateral review of that result in this Court.

For the reasons stated above the Court is respectfully requested to grant Arrow's motion for summary judgment.


Geoffrey M. Kalmus

Sworn to before
me this 3rd day of
September, 1974



BEATRICE HARMAN
Notary Public, State of New York
No. 3117 210
Qualified in New York County
Commission Expires March 30, 1976

DEFENDANT'S NOTICE OF SUPPLEMENTAL MOTION

(Same Caption)

Please take notice that upon the notice of motion of defendant Arrow Electronics, Inc. ("Arrow"), dated September 3, 1974, and the affidavits and exhibits annexed thereto, upon the notice of motion of plaintiffs dated September 16, 1974, and the papers submitted therewith, and upon the prior proceedings had herein, the undersigned will move this Court, before Chief Judge Jacob Mishler, in Courtroom 5, United States Courthouse, Cadman Plaza, Brooklyn, New York, on October 4, 1974, at 10 A. M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment to Arrow upon the ground that there is no genuine issue as to any material fact and that the State statute, the constitutionality of which is challenged by plaintiffs, is constitutional as a matter of law, and, in the alternative, for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the plaintiffs' complaint for failure to state a claim upon which relief can be granted.

New York, New York
September 27, 1974

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll
/s/ Geoffrey Kalmus
Attorneys for Defendant
Arrow Electronics, Inc.

To:
Samuel M. Sprafkin, Esq.
Attorney for Plaintiffs

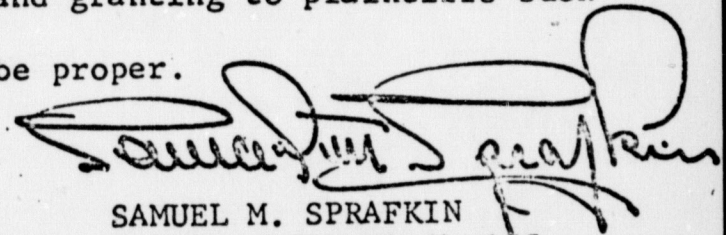
Honorable Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendant

PLAINTIFFS' NOTICE OF MOTION FOR SUMMARY JUDGMENT

(Same Caption)

PLEASE TAKE NOTICE that upon the affidavits of MAURICE GOLDBERG, sworn to September 10, 1974, and SAMUEL M. SPRAFKIN, sworn to September 16, 1974, the record of the proceedings and briefs in the New York State courts and the pleadings herein, the undersigned will move this Court, before Chief Judge Jacob Mishler, United States Courthouse, Brooklyn, New York, on September 27, 1974 at 10:00 A.M. o'clock, for an order pursuant to Rules 56 and 57 of the Federal Rules of Civil Procedure, striking the first, second and third affirmative defenses and the answer of the defendant, ARROW ELECTRONICS, INC., granting summary judgment to plaintiffs, and granting to plaintiffs such other and further relief as may be proper.

Dated: New York, N.Y.
September 16, 1974



SAMUEL M. SPRAFKIN
Attorney for Plaintiffs
230 Park Avenue
New York, N.Y. 10017
Telephone: 689-2580

To:
NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL, ESQS.
Attorneys for ARROW ELECTRONICS, INC.
919 Third Avenue
New York, N.Y. 10022
Telephone: 688-1100

GOLDBERG AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

(Same Caption)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MAURICE GOLDBERG, being duly sworn, deposes and says:

I am one of the plaintiffs. I submit this affidavit
(1) in support of our motion for summary judgment, and (2) in
opposition to defendants' motion for summary judgment.

This action is supplementary to the proceedings which
we were compelled to commence in the New York Supreme Court
under New York Business Corporation Law Section 623 (BCL §623).
Had we not done so, we would have lost our rights as dissenting
shareholders. While that proceeding was pending, the corporate
defendant abandoned the corporate merger. The New York Supreme
Court held that when there is an abandonment of the corporate
merger some eight months after its authorization, the statute
provided for no relief to us, as dissenting shareholders, and
denied our application for relief. By virtue of the statute,
we thus were deprived of our rights and property, in violation
of the Fourteenth Amendment. This action is brought to obtain
redress for such deprivation. The State courts did not rule
upon the constitutional question. They refused to do so.

Goldberg Affidavit in Support of Plaintiffs' Motion for
Summary Judgment and in Opposition to Defendants' Motion
for Summary Judgment

I submit the entire record of the proceedings in the New York State courts and the briefs of the parties.

The affidavit of defendant's counsel, submitted in support of defendant's motion, is replete with inaccurate statements relative to the State Court proceedings. That affidavit also is argumentative and not factual. The affidavit is recklessly made, not only with respect to the truth, but also with respect to simple copying of quoted portions.

An example of the former appears at page 22 of the affidavit of defendant's counsel. He states that I "pled guilty -- to a state criminal charge relating to the receipt of a kick back * * ." I was indicted. I never pleaded guilty. The indictment was dismissed. Herewith is a certificate to that effect from the County Clerk of New York County. I have never been convicted of any crime.

Defendant's recklessness ranges from the foregoing to not reading what was copied by defendant's typist. At page 12 the quotation incorrectly includes the word "not" in the ninth line.

Defendant knows that it has used a State statute to deprive us of our rights. It seeks to cast off this guilt feeling by claiming that it is the aggrieved party because it

Goldberg Affidavit in Support of Plaintiffs' Motion for
Summary Judgment and in Opposition to Defendants' Motion
for Summary Judgment

is being subjected to "repetitious litigation". The litigation is not repetitious. It is an independent supplementary cause of action.

At the time of the shareholders' meeting, defendant knew the number of shares objecting to the merger. Defendant knew the approximate amount it required to pay for dissenters' shares. Defendant knew that it did not have the money to pay for those shares. Defendant knew that the agreements with its institutional lender did not allow payment for those shares. Despite this, defendant had its shareholders approve the merger. Plaintiffs, having properly objected to the merger prior to the shareholders' meeting, then followed the precise procedural requirements of BCL §623. Our share certificates were endorsed with the statutory legend, which made us monetary claimants for the value of our shares. Our shares were "frozen". They could not be traded on the American Stock Exchange.

When the trading price of the shares on the American Stock Exchange increased, defendant moved forward. When the trading price declined, defendant did nothing. When it was time for defendant to commence the judicial proceeding provided for under BCL §623(h), the trading price had declined. Defendant did not commence the proceeding. Instead, we were compelled to

Goldberg Affidavit in Support of Plaintiffs' Motion for
Summary Judgment and in Opposition to Defendants' Motion
for Summary Judgment

commence this proceeding. If we had not, we would have lost our rights as dissenters, thus allowing defendant to move forward with its merger without paying us anything.

We instituted the proceeding under BCL §623(h) by the appropriate petition. We sought to move forward. It was to defendant's advantage to delay the proceeding. If the trading price of the shares increased over the price or value as of the day before the shareholders' authorization date, defendant stood to gain. It was not to its advantage to move forward when the trading price had declined.

On defendant's representation that it was negotiating for a loan from its institutional lender, the New York State Court denied without prejudice our application to move forward with the proceeding.

About one month later, when the trading price of the shares had declined further, defendant abandoned the merger. The Appellate Division of the New York State Supreme Court held that the statute pursuant to which we had commenced our proceeding made no provision for any relief to us when the defendant abandoned the merger. Thus, the defendant had played the corporate game of "heads I win, tails you lose".

Goldberg Affidavit in Support of Plaintiffs' Motion for
Summary Judgment and in Opposition to Defendants' Motion
for Summary Judgment

We then sought to show, on applications for reconsideration and for leave to appeal, that such interpretation of the statute was incorrect, that in fact the statute did provide for such relief, and that any other construction would result in the use of the statute to deprive us of our rights and property, without compensation, contrary to the Fourteenth Amendment of the United States Constitution. The State courts refused to consider the constitutional question. They adhered to the holding that the statute provided no relief to dissenters when there is an abandonment.

This action is brought for redress because, by virtue of BCL §623, we were deprived of our rights and property, in violation of the Fourteenth Amendment. During the period of more than eight months, when our status was that of a monetary claimant, our shares could not be traded in the marketplace; our investment was frozen. When the defendant unilaterally abandoned the merger, we were deprived of the right to receive payment of the value of our shares. When the defendant unilaterally abandoned the merger, reinstatement to shareholder status did not restore us to the position we were in eight months earlier. The shares had declined in value and price. During that eight-month period, we had no control over our investment. The statute provided us with no forum for relief,

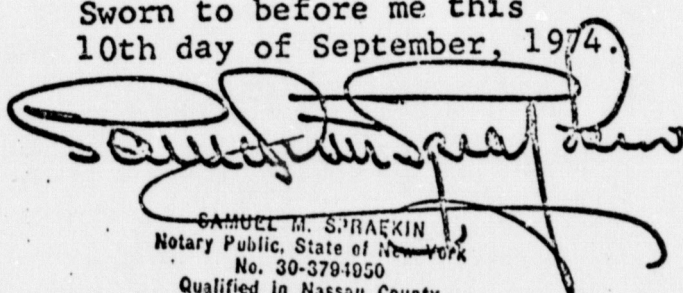
Goldberg Affidavit in Support of Plaintiffs' Motion for
Summary Judgment and in Opposition to Defendants' Motion
for Summary Judgment

not even the costs and expenses of the proceeding which we were compelled to commence to preserve our rights as dissenting shareholders.

The answer of the defendant, ARROW ELECTRONICS, INC., and its first, second and third affirmative defenses are without merit. They are sham and were interposed solely for delay. Summary judgment should be granted to plaintiffs and a hearing should be held to assess the amount to be awarded plaintiffs by reason of having been deprived of their rights and property.


MAURICE GOLDBERG

Sworn to before me this
10th day of September, 1974.


SAMUEL M. SPRACKIN
Notary Public, State of New York
No. 30-3794950
Qualified in Nassau County
Commission Expires March 30, 1975

Attachment to Goldberg Affidavit in Support of Plaintiffs'
Motion for Summary Judgment and in Opposition to Defendants'
Motion for Summary Judgment

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

MISCELLANEOUS
 CERTIFICATE

NO. 3706

FEE PAID \$4.00

THE PEOPLE OF THE STATE OF
 NEW YORK

against

on

for

Indictment
Grand Larceny in the First Degree
Forgery in the Third Degree

No.

2495-70

Filed

May 18,

1970

Maurice Goldberg

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court, New York County, do

certify that it appears from an examination of the Records on file in this office, that *on Feb. 8, 1972*
on motion of counsel for Defendant H. O. N. Frankel
and on consent of District Attorney Oscar Cohen -
Indictment is dismissed. The Honorable Harold Ruess
a justice of this Court presiding.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 9 day of

Sept., 1974

Norman Goodman
 County Clerk and Clerk of the Supreme Court,
 New York County.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

1. I am plaintiffs' attorney. I was plaintiffs' attorney in the proceedings in the New York State courts. I am fully familiar with the facts and proceedings. I submit this affidavit in opposition to defendant's motion for summary judgment and in support of plaintiffs' motion for summary judgment.

3. At Special Term of the New York Supreme Court, no constitutional issue was raised. It was plaintiffs who commenced the proceedings. They were compelled to do so under the statute

Sprafkin Affidavit in Support of Plaintiffs' Motion for
Summary Judgment and in Opposition to Defendant's Motion
for Summary Judgment

when defendant had not instituted the proceedings. Had plaintiffs not commenced the proceedings, they would have lost their rights as dissenting shareholders for failure to comply with the procedural requirements of the statute.

4. When Murtagh, J., at Special Term, denied without prejudice plaintiffs' application to move forward with the special proceeding, seven months had elapsed since the merger had been authorized. The procedure set out in the statute was the sole and exclusive remedy afforded plaintiffs. When defendant unilaterally abandoned the merger one month later, plaintiffs returned to Special Term for additional relief. They had already appealed from the determination of Murtagh, J. They were still in the proceeding which they had commenced under §623(h). Under subparagraph (3) of §623(h), it is stated that the "jurisdiction of the court shall be plenary and exclusive."

5. However, Chimera, J., at Special Term, denied plaintiffs relief (except for counsel fees) and the Appellate Division denied all relief to plaintiffs because the statute made no provision for such relief.

6. It was only after the definitive ruling of the Appellate Division that plaintiffs sought to point out that the construction or interpretation of the statute by the Appellate Division was

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wrong. One of the arguments plaintiffs sought to advance was that such construction of the statute renders the statute unconstitutional. However, neither the Appellate Division nor the New York Court of Appeals entertained the argument. Neither ruled on the constitutional issue on the merits.

7. In paragraph 22 of its moving affidavit, defendant admits that the dismissal of the appeal in the New York Court of Appeals did not involve "a hearing on the merits" of plaintiffs' constitutional claim, although plaintiffs had urged the court not to dismiss the appeal because of the constitutional issue involved.

8. In paragraph 22 of its moving affidavit, defendant referred to plaintiffs' "procedural error" which resulted in plaintiffs not "securing a hearing on the merits of their constitutional claim until February 22, 1974 * *". Defendant is mistaken. Plaintiffs committed no procedural error. Defendant also is mistaken because plaintiffs did not secure a hearing on the merits of their constitutional claim in the Appellate Division when they moved for reconsideration or, in the alternative, for leave to appeal. Both branches of the motion were denied by the Appellate Division.

9. In paragraph 28 of its moving affidavit, defendant states that it argued that the motion for reconsideration was untimely, but on "the portion of the motion seeking leave to appeal, the

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for Summary Judgment

merits of the constitutional issue were joined." Defendant is in error. Had the merits of the constitutional issue been entertained by the Appellate Division, it would have so stated and granted the motion for reconsideration and then adhered to its decisions. Its denial of permission to appeal was not a decision on the merits of the constitutional issue.

10. In paragraph 29 of its moving affidavit, defendant states that the Court of Appeals "found no more merit than the Appellate Division" in the constitutional claim. The Court of Appeals did deny the motion for leave to appeal. It did not entertain and pass on the merits of the constitutional issue. Denial of the motion for leave to appeal could be for any number of reasons, one of which may be, but not necessarily so, plaintiffs' failure to raise the issue and have it passed on in the courts below. If the Court of Appeals had wished to entertain the constitutional issue on the merits, it would have done so on the original appeal taken as of right.

11. In paragraph 29 of its moving affidavit, defendant states that plaintiffs, in their brief to the Court of Appeals on the motion for leave to appeal, noted that the Appellate Division "presumably" rejected the constitutional question in denying leave to appeal. Defendant takes the word out of context and

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thus misstates the facts. Plaintiffs were required to state in their brief the questions of law which they sought to have the Court review. One of those was the constitutional issue. With respect to each question, the moving party is required to set forth how the question was dealt with in the lower courts. If the question had not been presented at all in the lower courts, the question could not be presented for review. Plaintiffs stated that the Special Term did not have the issue before it and that the Appellate Division created this issue by its construction of the statute. The issue was called to the attention of the Appellate Division on the motion for reconsideration and that it "presumably" answered the question in the negative when it denied plaintiffs' motion. This was clarified by the parenthetical references to paragraph 8-11 of the moving affidavit, where the specific facts were set out in detail with the determination of the Appellate Division (see accompanying record pages 250-252, 271-272). Thus it was clear that the Appellate Division had not ruled on the constitutional issue on the merits. Indeed, it was not "necessary" for the Appellate Division to have answered the question at all as the basis for its denial of the motion.

12. In paragraph 36 of its moving affidavit, defendant asserts that plaintiffs should have sought review of the State court

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judgment in the United States Supreme Court. Defendant is in error. No review may be had in the United States Supreme Court on a non-constitutional of the State courts.

13. In this Court plaintiffs are not seeking to re-litigate what was determined in the State courts. Plaintiffs' present cause of action is supplementary to the State court proceeding. In this action, plaintiffs seek redress for being deprived of their rights and property, in violation of the Fourteenth Amendment to the United States Constitution.

14. Plaintiffs, in accordance with BCL §623, gave up their shareholder status for that of monetary claimants for the value of their shares. To preserve their rights as dissenting shareholders, plaintiffs were compelled to comply with the precise procedural requirements set forth in the statute. They were compelled to commence the statutory judicial proceeding upon the failure of defendant to do so. The subsequent unilateral act of the defendant in abandoning the merger automatically terminated the proceeding and deprived plaintiffs of their rights. Reinstatement to shareholder status more than eight months later is no substitute for share value. By virtue of the statute, plaintiffs were not restored to the position they were in eight months earlier. During that period of eight months, plaintiffs'

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shares could not be traded on the American Stock Exchange because of the statutory legend endorsed on their certificates. During that eight-month period, plaintiffs' shares had declined in price and value. By virtue of the statute, defendant's unilateral act of abandonment deprived plaintiffs of the right to be compensated for the loss in value, for their costs and expenses, including attorneys fees of the judicial proceedings which plaintiffs were compelled to commence. By virtue of the statute, defendant's unilateral act of abandonment automatically deprived plaintiffs of a forum in which to be heard with respect to their claims.

WHEREFORE, it is respectfully requested that defendant's motion be denied and that plaintiffs' motion for summary judgment be granted and a hearing held to be assess the amount to be awarded plaintiffs, by reason of having been deprived of their rights and property.


SAMUEL M. SPRAFKIN

Sworn to before me this
16th day of September, 1974.

Handwritten signature of Mandel M. Einhorn

MANDEL M. EINHORN
Notary Public, State of New York
No. 31-6163685
Qualified in New York County
Commission Expires March 30, 1978

PLAINTIFFS' NOTICE OF PETITION IN STATE COURT
COMMENCING PROCEEDING UNDER B.C.L. §623

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of	:	
MAURICE GOLDBERG, individually and as	:	
Custodian for MARION GOLDBERG, BETTE	:	
GOLDBERG and JOYCE E. GOLDBERG under	:	
The New York Uniform Gifts to Minors Act,	:	Index No.
and MAURICE GOLDBERG, HENRY J. GOLDBERG	:	22146-72
and SAMUEL M. SPRAFKIN as Trustees under	:	
the Trusts for the benefit of MARION	:	
GOLDBERG, BETTE GOLDBERG and JOYCE E.	:	
GOLDBERG and CLAIRE GOLDBERG,	:	
Petitioners,	:	
To determine their rights as dissenting	:	
shareholders, and to fix and recover the	:	
fair value of their shares in and from	:	
ARROW ELECTRONICS, INC.,	:	
Respondent,	:	
under Section 623 of the Business Corporation	:	
Law.	:	

----- -x

Sirs:

PLEASE TAKE NOTICE, that upon the annexed petition verified October 12, 1972 and upon the affidavit of MAURICE GOLDBERG sworn to October 12, 1972, the undersigned will move this Court at the Special Term, Part 1 thereof to be held at the Courthouse, 60 Centre Street, Borough of Manhattan, City of New York on October 26, 1972 at 9:30 A.M. o'clock, for an order pursuant to Section 623 of the Business Corporation Law, determining the value of the common shares in Respondent owned by

Plaintiffs' Notice of Petition in State Court
Commencing Proceeding under B.C.L. §623

each of the Petitioners, to be paid to each of the Petitioners by Respondent, with interest from May 25, 1972, and the costs and expenses of the proceedings, and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that Respondent's Answer to the Petition and the affidavit in support of said Answer, if any, are to be served at least five days before the return date.

Petitioners designate New York County as the place of trial. The basis of venue is the office of Respondent in New York County.

Dated: New York, N.Y.
October 12, 1972

SAMUEL M. SPRAFKIN
Attorney for Petitioners
Office and P. O. Address
230 Park Avenue
New York, N. Y. 10017
Tel. No.: 689-2580

To: Arrow Electronics, Inc.
Respondent
26 Broadway
New York, N.Y.

PLAINTIFFS' PETITION IN STATE COURT PROCEEDING

(Same Caption)

To the Supreme Court of the State of New York:

Petitioners, by their attorney Samuel M. Sprafkin, respectfully show and allege:

1. At all times herein mentioned Petitioner, MAURICE GOLDBERG was the owner of record of 68,672 shares of the common stock of Respondent of a par value of \$1.00 per share.

2. At all times herein mentioned, Petitioner, MAURICE GOLDBERG, as Custodian for MARION GOLDBERG under the New York Uniform Gifts to Minors Act was the owner of record of 400 shares of the common stock of Respondent of a par value of \$1.00 per share.

3. At all times herein mentioned, Petitioner, MAURICE GOLDBERG, as Custodian for BETTE GOLDBERG under the New York Uniform Gifts to Minors Act, was the owner of record of 400 shares of common stock of Respondent of a par value of \$1.00 per share.

4. At all times herein mentioned, Petitioner, MAURICE GOLDBERG, as Custodian for JOYCE E. GOLDBERG under the New York Uniform Gifts to Minors Act, was the owner of record of 400 shares of the common stock of

Plaintiffs' Petition in State Court Proceeding

Respondent of a par value of \$1.00 per share.

5. At all times herein mentioned, Petitioners, MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trust for the benefit of MARION GOLDBERG, were the owners of record of 1,200 shares of the common stock of Respondent, of a par value of \$1.00 per share.

6. At all times herein mentioned, Petitioners, MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trust for the benefit of BETTE GOLDBERG were the owners of record of 1,200 shares of the common stock of Respondent of a par value of \$1.00 per share.

7. At all times herein mentioned, Petitioners, MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trust for the benefit of JOYCE E. GOLDBERG, were the owners of record of 1,200 shares of the common stock of Respondent of a par value of \$1.00 per share.

8. At all times herein mentioned, Petitioner, CLAIRE GOLDBERG was the owner of record of 1,400 shares of the common stock of Respondent of a par value of

Plaintiffs' Petition in State Court Proceeding

\$1.00 per share.

9. Respondent is a corporation duly organized and existing under the laws of the State of New York. It has an office at No. 26 Broadway in the Borough of Manhattan, County and City of New York.

10. Upon information and belief, on or about May 25, 1972 the authorized capital stock of Respondent consisted of 2,500,000 shares of common stock, par value \$1.00 per share, and 1,000,000 shares of preferred stock, par value \$1.00 per share; that 1,525,984 shares of common stock were issued and outstanding, and 175,900 shares of common stock were reserved for issuance upon the exercise of certain options and warrants.

11. On or about April 28, 1972 Respondent issued to its shareholders a notice of the annual meeting of its shareholders to be held on May 25, 1972 at 2:00 P.M. o'clock at Marine Midland Bank - New York, 140 Broadway, New York, N.Y., for the purpose of, among others, considering and acting upon a proposal to change the state of incorporation of Respondent from New York to Delaware by merging it into a newly formed wholly owned Delaware subsidiary; and the merger, if

Plaintiffs' Petition in State Court Proceeding

adopted, to result in the increase of the authorized shares of common stock, par value \$1.00 per share, from 2,500,000 to 3,000,000.

12. At the annual meeting of the shareholders of Respondent, held on May 25, 1972 at 2:00 P.M. o'clock, the shareholders adopted and approved the Plan and Agreement of Merger between Respondent and the Delaware corporation of the same name, in the form attached to the proxy statement providing for the merger of Respondent with and into the said subsidiary Delaware corporation, and for an increase in the authorized number of shares of common stock from 2,500,000 to 3,000,000.

13. Prior to the vote upon the matter set forth herein, Petitioners duly objected in writing to the aforesaid Plan and Agreement to merge Respondent into the newly formed wholly owned subsidiary Delaware corporation of the same name and to the increase of its authorized number of shares of common stock.

14. Within ten days after the shareholders meeting on May 25, 1972 at which such Plan and Agreement of merger was adopted and approved, Respondent gave written notice of such shareholders' authorization

Plaintiffs' Petition in State Court Proceeding

by registered mail to Petitioners.

15. Within twenty days after the giving of said notice to Petitioners of the shareholders' authorization and on June 13, 1972, Petitioners filed with Respondent written notices of their election to dissent and demanded payment of the fair value of their shares. Petitioners duly submitted their certificates representing their shares in Respondent for the notation thereon of their election to dissent. After the notations were made, the certificates were returned to Petitioners.

16. Within ninety days from the shareholders' authorization and on or about August 23, 1972, Respondent offered to pay to the Petitioners \$9.00 with respect to each share of the common stock of Respondent owned by Petitioners on May 25, 1972, conditioned upon the consummation of the merger of Respondent with and into Arrow Electronics, Inc. the Delaware Corporation, which merger has not yet been consummated.

17. Petitioners and Respondent failed to agree, within the period of thirty days after the making of the offer, upon the price to be paid for the shares of Petitioners in Respondent.

Plaintiffs' Petition in State Court Proceeding

18. The aforementioned thirty day period, for agreement upon the price to be paid for the shares of Petitioners, expired on or about September 17, 1972.

19. Respondent had twenty days after the expiration of said thirty day period within which to institute a special proceeding in this Court to determine the rights of Petitioners and to fix the fair value of the shares of Petitioners. Respondent failed to institute such proceeding. The twenty day period within which such proceeding was to have been instituted by Respondent has expired.

20. Less than thirty days have elapsed after the expiration of the aforesaid twenty day period for Respondent to institute the aforesaid special proceeding.

21. No previous application for the relief herein sought has been made.

WHEREFORE, Petitioners demand that an order be entered herein determining the rights of Petitioners to receive payment for their shares of stock in Respondent and fixing the fair value of said shares as of the close of business on the day prior to the shareholders' authorization date, which is May 25, 1972, to be paid

Plaintiffs' Petition in State Court Proceeding

by Respondent to Petitioners, excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal, with interest thereon from May 25, 1972, pursuant to Section 623 of the Business Corporation Law of the State of New York; and that Petitioners have such other and further relief as to the Court may appear just and proper; together with the costs and expenses of these proceedings.

Dated: New York, N.Y.
October 12, 1972

SAMUEL M. SPRAFKIN
Attorney for Petitioners
230 Park Avenue
New York, N.Y. 10017
689-2580

(Verified October 12, 1972
by MAURICE GOLDBERG, one of
the Petitioners.)

PETITIONER'S AFFIDAVIT IN SUPPORT OF
PETITION IN STATE COURT PROCEEDING

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

MAURICE GOLDBERG, being duly sworn, deposes and
says:

I am one of the petitioners. I submit this affidavit on behalf of the petitioners in support of the annexed application and petition.

I am not a "newcomer" to the Respondent. I am one of its founders. The Respondent was organized as a New York corporation. It has been a New York Corporation continuously since its inception.

We objected to having Respondent becoming a Delaware corporation. We objected to having it increase its number of authorized shares. Despite our objections at the annual meeting held on May 25, 1972, the shareholders approved and authorized the Plan and Agreement to effectuate the change and the increase in the number of authorized shares.

Upon receiving formal notice of the shareholders' authorization, we filed our formal notice of our election to dissent and demanded payment of the

Petitioner's Affidavit in Support of
Petition in State Court Proceeding

fair value of our shares. We submitted our share certificates and the appropriate statutory notations were made thereon.

Respondent then offered to pay to us \$9.00 per share, conditioned upon the consummation of the merger, but such merger has not yet been consummated. Such \$9.00 per share offer was not acceptable. We and Respondent failed to agree on a price to be paid for each share.

Respondent did not commence a special proceeding under Section 623 of the Business Corporation Law to determine the rights of petitioners and to fix the fair value of our shares. The time for Respondent to do so expired. Hence, petitioners have commenced this Special Proceeding pursuant to said Section of the Business Corporation Law.

The offer of \$9.00 per share for petitioners' shares is not the fair value as of the close of business on May 24, 1972. Such offer does not represent the fair value of a common share of petitioners' stock in Respondent as of the close of business on May 24, 1972. It is grossly undervalued and inadequate. We

Petitioner's Affidavit in Support of
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verily believe that such offer was not made in good faith.

The shares of Respondent are listed and traded on the American Stock Exchange. Using January 2, 1972 as a starting point, the Wall Street Journal showed trading activity in these shares for each day through May 25, 1972 and until to date. Also from the first of the year through May 24, 1972 the high for such shares was \$13.50 per share. The following is a compilation of the trading as shown in the Wall Street Journal from March 20 through May 24, 1972. We have added a few subsequent trading days to complete the picture.

<u>Date</u>	<u>Closing Price</u>
March 20, 1972	\$11-3/8
March 21, 1972	11-1/4
March 22, 1972	11
March 23, 1972	11-1/2
March 24, 1972	11-3/8
March 27, 1972	11
March 28, 1972	10-5/8
March 29, 1972	10-3/4
March 30, 1972	10-1/4
April 3, 1972	10-3/4
April 4, 1972	10-5/8
April 5, 1972	10-1/2
April 6, 1972	11-1/8
April 7, 1972	11-1/8
April 10, 1972	10-3/4
April 11, 1972	10-3/4
April 12, 1972	10-3/4
April 13, 1972	10-3/4

Petitioner's Affidavit in Support of
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<u>Date</u>	<u>Closing Price</u>
April 14, 1972	\$10-5/8
April 17, 1972	10-1/8
April 18, 1972	10-1/8
April 19, 1972	10-5/8
April 20, 1972	10-5/8
April 21, 1972	11-3/8
April 24, 1972	11-1/4
April 25, 1972	10-5/8
April 26, 1972	10-1/4
April 27, 1972	10-5/8
April 28, 1972	10-1/4
May 1, 1972	10
May 2, 1972	9-7/8
May 3, 1972	10
May 4, 1972	10-1/8
May 5, 1972	10
May 8, 1972	10
May 9, 1972	9-3/4
May 10, 1972	10
May 11, 1972	10-1/4
May 12, 1972	10
May 15, 1972	10-5/8
May 16, 1972	10-1/8
May 17, 1972	10-1/8
May 18, 1972	10-3/8
May 19, 1972	10-1/8
May 22, 1972	9-7/8
May 23, 1972	10
May 24, 1972	10
May 25, 1972	10-3/8
May 26, 1972	10-1/2
May 30, 1972	10

Respondent's net income per share has increased. The 1971 Annual Report showed it to be 97¢ per share, or an increase of 5¢ per share over the prior year. At the annual meeting, copies of a news release were distributed. It showed a further increase to 26¢ per

Petitioner's Affidavit in Support of
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share for the quarter annual period ended March 31, 1972 or an increase of 2¢ per share over that of the corresponding period in 1971.

Compared to other and similar companies, Respondent's price-earnings ratio is low, indicating that the stock is underpriced as traded. This may be due to the low volume of daily trades.

WHEREFORE, it is respectfully requested that the relief demanded in the accompanying Notice and Petition be granted.

MAURICE GOLDBERG

(Sworn to October 12, 1972.)

PETITIONER'S AFFIDAVIT IN SUPPORT OF
PETITION IN STATE COURT PROCEEDING

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAMUEL M. SPRAFKIN, being duly sworn, deposes
and says:

I am a trustee of three trusts which hold shares
of the Respondent. As such fiduciary I joined in the
election to dissent and demanded payment of the fair
value of our shares. On behalf of all the dissenting
shareholders, I submit this affidavit in reply to the
answering affidavit submitted on behalf of Respondent.

The answering affidavit asserts in Paragraph 8
that "The merger would have no real affect - and cer-
tainly no adverse affect - upon Arrow's business or the
interests of its shareholders; it would merely change
the state of its domicile." This is not so.

The corporate laws of New York are far more
solicitous and more protective of the rights of share-
holders and of their interests than are those of
Delaware. The Respondent had embarked on a series of
acquisitions some of which are entirely unrelated to
its business of the past 25 years. Respondent in its
proxy statement for the annual shareholders meeting of

Petitioner's Affidavit in Support of
Petition in State Court Proceeding

May 25, 1972 reiterated that it intends to pursue its acquisition opportunities. The reason for the proposed change in the state of incorporation from New York to Delaware was stated in the proxy to be Delaware's "laws are generally more favorable to corporate expansion through mergers."

Indeed, in that proxy statement Respondent sets forth the "material differences between the applicable laws of New York and Delaware." A photocopy is attached as Exhibit 1. This clearly shows that the interests and rights of petitioners as shareholders will be adversely affected by the change.

This is especially so, since Petitioners have been of the opinion that Respondent's acquisitions are not in its best interests and those of its shareholders.

Petitioners no longer have any rights as shareholders, except the right to be paid the fair value of their shares as of May 24, 1972. Petitioners no longer have the right to withdraw their notice of election to dissent. Petitioners' share certificates now have endorsed thereon the conspicuous legend that a notice of election has been filed. The shares cannot be sold or

Petitioner's Affidavit in Support of
Petition in State Court Proceeding

traded. A transferee would merely stand in the shoes of his dissenting shareholder-transferor.

More than five months have elapsed since the shareholders' authorization meeting on May 25, 1972. Respondent still cannot say whether it will go forward with the merger or whether it will abandon it.

Any further delay will prejudice Petitioners.

We respectfully submit that Petitioners' rights are not dependent on Respondent's indecision to proceed with the merger or to abandon it.

Accordingly, the motion should be granted and an order entered pursuant to Section 623 of the Business Corporation Law, setting the matter down for a hearing to determine the value of Petitioners' shares in Respondent, all as demanded in the Notice of Petition.

SAMUEL M. SPRAFKIN

(Sworn to November 6, 1972.)

EXHIBIT ATTACHED TO PETITIONER'S AFFIDAVIT IN
SUPPORT OF PETITION IN STATE COURT PROCEEDING

ARROW ELECTRONICS, INC.

Annual Meeting of Shareholders
May 25, 1972

PROXY STATEMENT

* * *

Reasons for the Proposed Merger and
Increase in Authorized Common Stock

* * *

As discussed more fully below, there are certain material differences between the corporate laws of Delaware and New York, including provisions which are generally more favorable to corporate expansion through mergers. The increase in the authorized common stock to be effected by the proposed merger will enable Arrow Delaware to issue such stock for any proper corporate purpose, including acquisitions of, or mergers with, other corporations.

Although Arrow is generally interested in pursuing acquisition opportunities, it should be stressed that Arrow has no present specific plans for the acquisition or formation of any business and can give no assurance that any advantageous opportunities will develop or that any actual undertaking will be profitable. Management believes, however, that the proposed merger and increase in authorized Common Stock will give Arrow additional flexibility with respect to deriving the maximum benefit from any opportunities which may arise.

* * *

Material Differences Between Applicable Laws
of New York and Delaware

Exhibit Attached to Petitioner's Affidavit in
Support of Petition in State Court Proceeding

The following are the material differences between the corporate laws of the States of New York and Delaware.

1. Under New York law corporate action must be taken by the Board at a formal meeting, regardless of any difficulty or expense to the company in assembling Directors for such a meeting. Under Delaware law the Board may hold meetings by means of conference telephone, and may take action by the unanimous written consent of Directors without the necessity to convene a meeting of the Board.

2. Under New York law any merger or consolidation must be approved by two-thirds of the shares entitled to vote with respect to such merger. Under Delaware law a majority of the shares entitled to vote can approve a merger or consolidation and, furthermore, a corporation can merge or consolidate without stockholder approval, provided the merger or consolidation does not amend the corporation's certificate of incorporation or alter the shares outstanding and the number of shares of stock issued or to be issued through a convertible security given in the merger or consolidation does not exceed twenty percent (20%) of the shares of that class outstanding prior to the merger or consolidation.

3. New York law requires approval by two-thirds of the shares entitled to vote for the sale of all or substantially all of the corporate assets, whereas Delaware law requires approval by a majority.

4. Under New York law the issuance of stock options to officers, directors and employees must be authorized by the vote of a majority of the outstanding shares entitled to vote, or be pursuant to a plan adopted by such vote. Delaware law does not require stockholder approval of such stock options; however, in order for stock options to be "qualified stock options" under the provisions of the Internal Revenue Code of 1954, as amended, stockholder approval is required. Furthermore, the American Stock Exchange (on which the Common Stock of Arrow Delaware is to be listed) requires stockholder

Exhibit Attached to Petitioner's Affidavit in
Support of Petition in State Court Proceeding

approval as a prerequisite to the listing of shares reserved for issuance pursuant to most stock options.

5. Stockholders of a Delaware corporation objecting to a sale or other disposition of substantially all the corporate assets have no statutory right to require the corporation to purchase their shares, while such a right is available to shareholders of a New York corporation in certain situations. As to mergers and consolidations, Delaware law provides more limited appraisal rights, which apply only where (i) the shares, on the record date of the meeting called to pass upon the transaction, are not registered on a national securities exchange or are held of record by less than 2,000 stockholders, and (ii) the shares are so registered or held and the holders thereof will receive in the merger or consolidation something other than shares in the surviving corporation or shares in another corporation which, on such record date, are registered on a national securities exchange or held by not less than 2,000 stockholders. Since the shares of Arrow Delaware will be listed on the American Stock Exchange, its stockholders will have no appraisal rights with respect to any merger or consolidation in which they receive shares of the surviving corporation or shares of another corporation, which, on the record date, are listed on a national securities exchange or held by not less than 2,000 stockholders.

6. The Delaware law regarding indemnification is somewhat broader than that of New York. Delaware law permits indemnification pursuant to any by-law, agreement, vote of stockholders or vote of disinterested directors; whereas, the New York statute is the exclusive source of indemnification provisions for officers and directors of New York corporations.

Section 145 of the General Corporation Law of the State of Delaware allows a corporation to indemnify a director, officer, agent or employee in those situations where it is determined that the person seeking indemnification has met the applicable standards, which are similar to the standards under New York law. Such determination is made by a majority vote of a quorum of the

Exhibit Attached to Petitioner's Affidavit in
Support of Petition in State Court Proceeding

board of directors who were not parties to the action, suit or proceeding, or if such a quorum is not obtainable, or if the board directs, by independent legal counsel in a written opinion, or by the stockholders. Under Delaware law, a person can also be indemnified for his expenses even if he is adjudged to be liable for negligence or misconduct in the performance of his duties to the corporation to the extent the Delaware Court of Chancery or the court in which such action or suit was brought shall determine such indemnity is proper. Under New York law, indemnification does not extend to expenses incurred in the settlement of actions by or in the right of the corporation, unless settlement is made with court approval.

Delaware law permits the prepayment of expenses incurred in defending a proceeding to which the indemnification provisions apply in advance of the final disposition of such proceeding if the corporation receives an undertaking, by or on behalf of the person who may be entitled to such indemnification, to repay such advances unless it shall be ultimately determined that he is entitled to indemnification. Under New York law, any prepayment of expenses must be considered in each specific case.

Delaware law permits a corporation to purchase and maintain insurance on behalf of any officer or director against liability incurred as a result of his position with the corporation regardless of whether the corporation would have the power to indemnify him against such liability. New York law also permits a corporation to purchase and maintain such insurance on behalf of officers and directors; however, New York law provides that no such insurance may provide for any payment, other than costs of defense, to any officer or director if, among other things, a judgment or other final adjudication adverse to the insured officer or director establishes that he committed acts of active and deliberate dishonesty which were material to the cause of action so adjudicated, or that he personally gained a financial profit or advantage to which he was not legally entitled.

Exhibit Attached to Petitioner's Affidavit in
Support of Petition in State Court Proceeding

Delaware law has a retroactive effect, and therefore Arrow Delaware will have the power to indemnify its officers and directors against any liability incurred by them as a result of their positions with Arrow to the fullest extent permitted under Delaware law. There is currently no such pending or threatened litigation against any officers or directors of Arrow.

It is the intent of the new By-Law provisions to require Arrow Delaware to indemnify all of its officers and directors and all other persons serving at its request as officers or directors of another corporation or other enterprise to the fullest extent permissible under Delaware law and to give Arrow Delaware full discretion in the indemnification of any agent or employee who is not such an officer or director. The new By-Law provisions also require that advance payments to cover expenses incurred in defending a proceeding be made to all officers and directors who are entitled to indemnification under the provisions of the By-Laws.

As permitted by Delaware law, the new By-Law provisions state that the mandatory indemnification provisions (i) are not exclusive of any other rights to which any director, officer, employee or agent may be entitled by agreement, vote of the stockholders or directors or otherwise and (ii) continue as to a person who has ceased to be a director or officer and inure to the benefit of his heirs, executors and administrators. The new By-Law provisions state that the rights of directors and officers vest at the time the transaction, event, action or conduct to which the resulting action, suit or proceeding relates was first taken or engaged in (or omitted to be taken or engaged in) and that no action taken by Arrow Delaware, by amendment of its By-Laws or otherwise, shall diminish or adversely affect any rights which shall have become vested prior to the date of such amendment or other corporate action.

Management believes that adequate provision for the indemnification of officers and directors is desirable to induce persons to serve in executive positions. Section 145 of the General Corporation Law of the State

Exhibit Attached to Petitioner's Affidavit in
Support of Petition in State Court Proceeding

of Delaware, which governs indemnification, and the indemnification provisions of the By-Laws of Arrow Delaware are attached to this Proxy Statement as Exhibit B.

DEFENDANT-ARROW'S ANSWER TO PETITION
IN STATE COURT PROCEEDING

(Same Caption)

Respondent, by its attorneys, Nickerson, Kramer, Lowenstein, Nessen & Kamin, answers the petition as follows:

First: Admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, and 21 of the petition.

Second: Admits the allegations of paragraph 15 of the petition, except denies that petitioner Maurice Goldberg duly submitted the certificates representing all of his shares in respondent for the notation thereon of his election to dissent and alleges that such petitioner submitted certificates only with respect to 68,572 shares for such notation.

Third: Denies the allegations of paragraph 19 of the petition, except admits that respondent did not institute any special proceeding to determine the rights of petitioners and to fix the fair value of their shares and admits the expiration of the twenty-day period referred to in such paragraph of the petition.

First Affirmative Defense

Fourth: The corporate action (i.e., the merger of respondent, a New York corporation, into a newly-

Defendant-Arrow's Answer to Petition
in State Court Proceeding

formed Delaware corporate subsidiary of respondent of the same name, solely in order to change the state of incorporation of respondent) upon which petitioners' right to dissent and to receive payment for their shares of stock in respondent is predicated has not been consummated and may hereafter be abandoned.

Fifth: As a consequence, at the present time, petitioners have no right to an appraisal or to receive payment for their shares of respondent.

Sixth: This proceeding, therefore, should either be dismissed, subject to renewal in the event that the corporate action upon which petitioners' rights are predicated is consummated, or stayed until the abandonment or consummation of such corporate action by respondent.

Second Affirmative Defense

Seventh: Respondent has offered to pay petitioners the fair value of their shares, such offer being conditioned upon the consummation of the corporate action upon which petitioners' rights are predicated.

WHEREFORE, respondent requests that an order be entered:

1. Dismissing the petition without prejudice

Defendant-Arrow's Answer to Petition
in State Court Proceeding

to its renewal in the event that the corporate action (i.e., the merger of respondent, a New York corporation, into a Delaware corporation of the same name) upon which petitioners' right to dissent and to receive payment for their shares of stock in respondent is predicated is consummated, or

2. In the alternative, staying this proceeding until such corporate action is either formally abandoned by respondent or consummated by it, and

3. Awarding respondent the costs and disbursements of this proceeding.

Nickerson, Kramer,
Lowenstein, Nessen & Kamin
Attorneys for Respondent
919 Third Avenue
New York, N.Y. 10022
212 688-1100

New York, New York
November 1, 1972

To:
Samuel M. Sprafkin
Attorney for Petitioner
230 Park Avenue
New York, New York 10017
212 689-2580

(Verified November 1, 1972 by JOHN C. WADDELL,
Secretary-Treasurer of ARROW ELECTRONICS, INC.)

WADDELL AFFIDAVIT SUBMITTED BY DEFENDANT IN
OPPOSITION TO PETITION IN STATE COURT PROCEEDING

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

John C. Waddell, being duly sworn, deposes and
says:

1. I am secretary and treasurer of Arrow Electronics, Inc. ("Arrow"), the respondent in this special proceeding.

2. I make this affidavit in opposition to the petition of Maurice Goldberg and members of his family seeking an appraisal of their stock in Arrow and payment therefor pursuant to New York's dissenters' rights statute, Business Corporation Law §623. The affidavit is also in support of Arrow's request that the petition be dismissed without prejudice or that any further proceedings pursuant to it be stayed.

3. The ground of Arrow's opposition to the petition and the reason it seeks a dismissal or stay are very simple: The corporate action upon which the petitioners' right to dissent and receive payment for their shares is predicated has not been consummated and may never be carried into effect. Unless and until Arrow is actually merged into a newly created Delaware

Waddell Affidavit Submitted by Defendant in
Opposition to Petition in State Court Proceeding

corporate subsidiary of the same name, petitioners have no right under §623 to receive payment for their shares. As the discussion and the authorities cited in Arrow's accompanying legal memorandum demonstrate, the proper course in the present circumstances is for the Court to dismiss the petition, subject to its renewal in the event that the corporate action triggering petitioners' rights is actually consummated, or to stay further proceedings until such time as the merger is formally abandoned or is consummated. I turn to the details.

4. Arrow is a New York corporation engaged in the distribution and sale of electrical and electronic parts and in other business affairs. Its common stock is listed and traded on the American Stock Exchange.

5. At one time Mr. Goldberg was president of Arrow and he, members of his family, and trusts of which they are beneficiaries, continue to hold, in the aggregate, approximately 75,000 shares of Arrow common stock of a total of a little more than 1,500,000 shares outstanding.

6. In the spring of 1972, Arrow determined that its interests and those of its stockholders would be ad-

Waddell Affidavit Submitted by Defendant in
Opposition to Petition in State Court Proceeding

vanced by changing the state of its incorporation from New York to Delaware. Pursuant to this determination, a new Delaware subsidiary of Arrow, also called Arrow Electronics, Inc., was created and a plan and agreement for the merger of Arrow into its Delaware subsidiary was presented to Arrow shareholders for their approval at the annual meeting on May 25, 1972.

7. The merger agreement provided in Article VII for its abandonment by Arrow - even after stockholder approval - or by the new Delaware subsidiary at any time prior to its effective date, which was defined as the date that the merger agreement was filed with the Secretary of State of Delaware. Among the purposes of this provision was to enable Arrow to abandon the merger in the unexpected event that the holders of so large a number of Arrow shares exercised their right to dissent that the merger became financially impracticable.

8. I say "unexpected" because, as should be obvious, the merger would have no real affect - and certainly no adverse affect - upon Arrow's business or the interests of its shareholders; it would merely change the state of its domicile. Though I'm not a

Waddell Affidavit Submitted by Defendant in
Opposition to Petition in State Court Proceeding

lawyer, I understand from Arrow's counsel that only because of the highly technical language of Business Corporation Law §910 would the merger be subject to the dissenters' rights statute at all.

9. Despite these considerations, Mr. Goldberg and the members of his family and the trusts in which they have an interest objected to the merger and sought payment for their shares. Though Arrow has more than 1,500,000 shares of common stock in the hands of more than 1,500 shareholders, not a single stockholder other than the petitioners objected to the merger.

10. The effect of Mr. Goldberg's dissent, as a practical matter, has been to thwart consummation of the merger. In accordance with §623, Arrow has offered the petitioners \$9 per share for their almost 75,000 shares of common stock (the offer, of course, being conditioned, as provided in §623(g), upon ultimate consummation of the merger), a price which Arrow believes is more than fair. However, even were the petitioners to accept the \$9 per share offer (in fact, Mr. Goldberg characterizes it as "grossly undervalued and inadequate" in his moving affidavit), the cash outlay that would be

Waddell Affidavit Submitted by Defendant in
Opposition to Petition in State Court Proceeding

required to pay petitioners for their shares would be almost \$675,000.

11. Arrow simply doesn't have \$675,000 available for the repurchase of its shares, if it is to continue running its business. Its present cash resources, approximately \$1 million, are needed to meet its day-to-day working capital requirements. For this reason, Arrow and its Delaware subsidiary have not consummated the merger (a fact which the petition itself (petition ¶16) acknowledges) and may hereafter abandon it.

12. Since learning of the petitioners' insistence upon the exercise of their right to dissent, Arrow has been engaged in discussions with its principal institutional lender looking to an increase of its capital resources through additional long term borrowing. In the event that these negotiations are successful, it may be that Arrow will obtain sufficient additional cash to make it feasible to go forward with its merger plans, despite petitioners' insistence on their right to dissent. However, the outcome of these negotiations and the impact of any new loan agreement upon Arrow's cash position cannot be determined at the present time.

Waddell Affidavit Submitted by Defendant in
Opposition to Petition in State Court Proceeding

13. As matters now stand, Arrow may go forward with the merger or may abandon it, depending on the future developments, and any determination of petitioners' rights should await a definitive decision by Arrow.

It is respectfully requested either that the petition be dismissed, without prejudice to its renewal in the event that Arrow hereafter consummates its merger with its Delaware subsidiary, or, in the alternative, that further proceedings pursuant to the petition be stayed until such merger is formally abandoned by Arrow or is consummated.

JOHN C. WADDELL

(Sworn to November 1, 1972.)

ORDER OF MURTAGH, J. IN STATE COURT PROCEEDING

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM
 PART I, NEW YORK COUNTY at the Courthouse thereof,
 60 Centre Street, New York, New York 10007.

Present:

Hon. JOHN M. MURTAGH, Justice.

(SAME TITLE)

The following papers numbered 1 to 7 read on this motion,
 submitted No. 36 on Calendar of October 26, 1972

Papers
Numbered

Notice of Petition-Petition and Affidavits

Annexed.....	1 - 3
Answering Affidavit & Exhibit.....	4 - 5
Replying Affidavit & Exhibit.....	6 - 7

Upon the foregoing papers this motion is decided
 in accordance with accompanying memorandum decision.

Dated Jan 4 1973

J.M.

J.S.C.

Briefs: Petitioners' X Respondent's X

County Clerk's No. 22146, 1972

Spec I Liber G93 Line 7, 1972

FILED

Jan 8 1973

CO. CLERK'S OFFICE

NEW YORK

MEMORANDUM DECISION OF MURTAGH, J.
IN STATE COURT PROCEEDING.

(Same Caption)

MURTAGH, J.:

This is an application for an order pursuant to Section 623 of the Business Corporation Law, determining the value of the common shares in respondent owned by each of the petitioners. The corporate action upon which this proceeding is predicated has not yet been consummated. Respondent is seriously considering abandoning the corporate action. If the proposed action is abandoned or rescinded the shareholders will not have the right to receive payment for their shares. It is clear that the court may hold the proceeding in abeyance pending the consummation or abandonment of the corporate action (Matter of Hake, 285 App. Div. 316; Matter of McKinney, 306 N.Y. 207). However, the corporation by failing to act may not indefinitely deprive the dissenting stockholders of their status as stockholders. The corporation must act within a reasonable time (Matter of Hake, supra).

The court finds, in the circumstances of this case that at the present time there has not been an unreasonable delay in the corporation's failure to act.

Memorandum Decision of Murtagh, J.
in State Court Proceeding

The respondent is now involved in loan negotiations to obtain sufficient additional cash to make it feasible to go forward with the corporate action. The court finds that it would be premature at this time to grant the petition. Accordingly, the application is denied without prejudice to renewal in the event that the corporate action, upon which petitioner's right to dissent and to receive payment for their shares of stock in respondent is predicated, is consummated or upon a showing that the corporation's delay in either consummating or abandoning the corporate action has extended beyond a reasonable time.

Dated: January 4th, 1973.

J.M.

J.S.C.

FILED

JAN 8 1973

NEW YORK

CO. CLERK'S OFFICE

PETITIONERS' MOTION IN STATE COURT PROCEEDING AFTER
NOTIFICATION BY DEFENDANT OF ABANDONMENT OF MERGER

(Same Caption)

PLEASE TAKE NOTICE that upon the annexed affidavits of SAMUEL M. SPRAFKIN, sworn to February 12, 1973, the memorandum decision of Hon. John M. Murtagh, dated January 4, 1973, and upon the papers and proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part 1, at the Courthouse, 60 Centre Street, New York, N.Y., on the 2nd day of March, 1973 at 9:30 a.m., for an order

(a) adjudicating the abandonment by Respondent of its Plan and Agreement to merge with its wholly owned Delaware subsidiary and increase the number of its authorized shares;

(b) awarding to Petitioners \$52,068.69 for their costs, expenses and damages, inclusive of counsel fees, and awarding them their disbursements to be taxed by the Clerk, and directing Respondent to make payment thereof to Petitioners; and

(c) granting to Petitioners such other and further relief as may be just and proper.

PLEASE TAKE FURTHER NOTICE that any affidavit and paper to be used in opposition to this motion is

Petitioners' Motion in State Court Proceeding After
Notification by Defendant of Abandonment of Merger

to be served on the undersigned no later than five (5)
days prior to the return date hereof.

Dated: New York, N.Y.
February 12, 1973

SAMUEL M. SPRAFKIN
Attorney for Petitioners
230 Park Avenue
New York, N.Y. 10017

To:
NICKERSON, KRAMER, LOWENSTEIN,
NESSEN & KAMIN, ESQS.
Attorneys for Respondent
919 Third Avenue
New York, N.Y. 10022

AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION IN
STATE COURT PROCEEDING AFTER DEFENDANT'S
ABANDONMENT OF MERGER

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAMUEL M. SPRAFKIN, being duly sworn, deposes
and says:

Petitioners are shareholders of Respondent.
Their 74,872 shares are less than 5% of the more than
1,525,984 shares issued and outstanding.

In April, 1972 Respondent notified its share-
holders that at its shareholders annual meeting, the
shareholders would be requested to act upon the proposal
to merge Respondent into a newly formed, wholly owned,
Delaware subsidiary, thus changing the state of in-
corporation from New York to Delaware. The merger, if
adopted, also would result in a 500,000 share increase
of the authorized shares.

In its proxy statement mailed to its shareholders,
Respondent stated that the proposal to migrate to
Delaware was because Delaware's "laws are generally
more favorable to corporate expansion through mergers."
Respondent had embarked on a series of acquisitions and
mergers. Some of these were entirely unrelated to its
business of the prior twenty-five years. Petitioners

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

have been of the opinion that these mergers and acquisitions are not in the best interest of Respondent and its shareholders.

At the shareholders meeting on May 25, 1972, Petitioners objected both orally and in writing. Nevertheless, the other shareholders adopted and approved the Plan and Agreement of Merger and for the increase in the number of authorized shares.

Respondent then gave notice of the shareholders authorization to proceed with the merger. Petitioners, within the statutory twenty days thereafter, filed with Respondent their written notices of their election to dissent. They demanded payment of the fair value of their shares. They also submitted their certificates. These were endorsed with the notation of their election to dissent.

Petitioners thus lost their right to withdraw their notice of election to dissent. Petitioners no longer had any rights as shareholders, except the right to be paid the fair value of their shares as of May 25, 1972. The shares could not be sold or traded. A transferee merely would stand in the shoes of his transferor

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

dissenting shareholder.

The daily closing prices at which Respondent's shares were traded on the American Stock Exchange for the two month period prior to the shareholders authorization meeting range from a low of \$9.75 per share to \$11.375 per share. The average price computed on the basis of volume of shares traded was \$10.875 per share. Respondent offered Petitioners \$9.00 per share and then only conditioned upon the consummation of the merger, which had not yet been consummated. Obviously, Petitioners did not accept the offer.

Respondent had until October 7, 1972 to institute the special proceeding in this Court to determine the rights of Petitioners and to fix the fair value of their shares. Respondent did not do so.

Petitioners then instituted such proceeding within the required statutory period. They requested the Court to make an order pursuant to Section 623 of the Business Corporation Law to determine the value of their shares to be paid by Respondent, with interest from May 25, 1972, together with the costs and expenses of the proceedings.

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

Respondent came forward and requested that either

- (a) the proceedings be dismissed without prejudice or
- (b) that the proceedings be stayed or held in abeyance

until the merger is consummated or abandoned. Its position was that the corporate action had not been consummated and may never be carried into effect. It claimed not to have the \$9.00 per share cash required to repurchase the shares and that it was negotiating with "its institutional lender looking to an increase of its capital resources through additional long term borrowing."

In January, 1973, Mr. Justice Murtagh's memorandum decision was published. That memorandum reads in part as follows:

"* * * The respondent is now involved in loan negotiations to obtain sufficient additional cash to make it feasible to go forward with the corporate action. The court finds that it would be premature at this time to grant the petition. Accordingly, the application is denied without prejudice to renewal in the event that the corporate action, upon which the petitioners right to dissent and to receive payment for their shares of stock in respondent is predicated, is consummated or upon a showing that the corporation's delay in either consummating or abandoning the corporate action has extended beyond a reasonable time."

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

Immediately upon learning of the decision and on January 9, 1973 I wrote to Respondent's attorneys as follows:

"Dear Mr. Kalmus:

In the paper submitted in opposition to our motion, your client asserted that it is involved in loan negotiations to obtain sufficient additional cash to make it feasible to go forward with the proposed corporate action.

Please let us have all information with respect to the loan negotiations, particularly:

- 1) The name and address of each proposed lender with whom Arrow has been negotiating for the loan.
- 2) The name and title of each person acting on behalf of each such lender.
- 3) The details of the proposed loan, the amount, interest, terms and conditions of repayment and due date.
- 4) The present status of each such negotiation.

Sincerely,

S. M. Sprafkin"

Copy of letter is attached hereto as an exhibit.

Also on January 9, 1973 the President of Respondent telephoned one of the Petitioners, MAURICE GOLDBERG. This led to several telephone conversations and a con-

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

ference between me and one of Respondent's attorneys. The subject was settlement. Suffice it to state that Respondent would not budge from its \$9.00 per share offer, plus \$.75 additional per share for interest and expenses. This was inadequate and not accepted.

I kept insisting on a reply to my letter of January 9, 1973. On February 2, 1973, Respondent's attorneys forwarded to me their letter stating that Respondent had determined to abandon its Plan and Agreement of Merger. A copy of such letter is attached as an exhibit.

From May 25, 1972 through February 2, 1973, a period of eight months and eight days, Petitioners have had their capital investment frozen and placed in a position dependent solely at the mere whim and caprice of Respondent. Petitioners no longer had any rights as shareholders. They could do nothing. Certainly the least to which Petitioners are entitled is the interest on their capital during this eight month, eight day period. Assuming the average computed market price of \$10.875 per share, the interest at 7.5% per annum for the period is \$42,068.69. Even if we are to assume Respondent's ridiculously low offered price of \$9.00 per

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

share, the interest amounts to \$34,815.48.

In addition, Petitioners have incurred counsel fees. The fair and reasonable value thereof is no less than \$10,000. A separate affidavit for such services and for disbursements is made a part of this application.

Because Respondent did not institute this special proceeding, necessitating its commencement by Petitioners, because Respondent's offer of \$9.00 per share obviously was much less than the market price as traded in the open market, because such \$9.00 offer was made by Respondent conditioned upon its consummation of the corporate action of which it was in sole control, because Petitioners were deprived of all their rights as shareholders for a period of eight months and eight days, because Petitioners' capital investment was frozen, Petitioners should be awarded and Respondent directed to pay to Petitioners (a) damages or interest at the rate of 7.5% on the computed average market price of \$10.875 per share or on no less than Respondent's \$9.00 per share for the eight month and eight day period, (b) reasonable counsel fees of no less than \$10,000., as shown on the attached affidavit of services, to-

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

gether with disbursements.

SAMUEL M. SPRAFKIN

(Sworn to February 12, 1973.)

EXHIBIT 1

ATTACHED TO AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION IN
STATE COURT PROCEEDING AFTER DEFENDANT'S ABANDONMENT OF MERGER

SAMUEL M. SPRAFKIN

ATTORNEY AT LAW

—
TELEPHONE 669-2580

230 Park Avenue

New York, N. Y. 10017

January 9, 1973

Nickerson, Kramer, Lowenstein,
Nessen & Kamin, Esqs.
919 Third Avenue
New York, N.Y. 10022

Attention: Geoffrey M. Kalmus, Esq.
Re: Goldberg v. Arrow Electronics

Dear Mr. Kalmus:

In the paper submitted in opposition to our motion, your client asserted that it is involved in loan negotiations to obtain sufficient additional cash to make it feasible to go forward with the proposed corporate action.

Please let us have all information with respect to the loan negotiations, particularly:

- 1) The name and address of each proposed lender with whom Arrow has been negotiating for the loan.
- 2) The name and title of each person acting on behalf of each such lender.
- 3) The details of the proposed loan, the amount, interest, terms and conditions of repayment and due date.
- 4) The present status of each such negotiation.

Sincerely,

SMS:rs

s/S. M. Sprafkin

EXHIBIT 2

ATTACHED TO AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION IN
STATE COURT PROCEEDING AFTER DEFENDANT'S ABANDONMENT OF MERGER

NICKERSON, KRAMER, LOWENSTEIN, NESSEN & KAMIN

919 THIRD AVENUE

NEW YORK, N.Y. 10022

CABLE ADDRESS
NICKRAL

TELEPHONE
212-680-1100

February 2, 1973

Samuel M. Sprafkin, Esq.
230 Park Avenue
New York, New York 10017

Re: Goldberg v. Arrow

Dear Mr. Sprafkin:

Since our telephone conversation earlier this week, the board of directors of Arrow has determined to abandon the plan and agreement of merger. To that end, at its meeting on Wednesday, January 31, the board adopted the following resolutions:

Resolved, that, pursuant to the provisions of the Plan and Agreement of Merger, the Board of Directors hereby deems it in the best interest of the corporation to abandon the merger of the corporation with and into its wholly-owned subsidiary, Arrow Electronics, Inc., a Delaware corporation.

Resolved, that the appropriate officers and directors of the corporation hereby are authorized to take any and all actions which may be necessary or appropriate under Section 623 of the New York Business Corporation Law or otherwise to carry out the intent and purpose of the foregoing resolution, including, without limitation, notifying the American Stock Exchange and filing a Current Report on Form 8-K with the Securities and Exchange Commission and said exchange.

Exhibit 2

Attached to Affidavit in Support of Petitioners' Motion in
State Court Proceeding After Defendant's Abandonment of Merger

Samuel M. Sprafkin, Esq.
February 2, 1973
Page 2

If Mr. Goldberg will transmit his Arrow stock certificates and those of his family members to Arrow's transfer agent, Registrar & Transfer Company, 34 Exchange Place, Jersey City, New Jersey 07302, new certificates will be issued without legend.

In view of this development, no purpose would be served by responding to the inquiries in your letter of January 9.

Sincerely,

s/Geoffrey M. Kalmus

GMK:bdh

AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION IN
STATE COURT PROCEEDING AFTER DEFENDANT'S
ABANDONMENT OF MERGER

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

MAURICE GOLDBERG, being duly sworn, deposes and
says:

I am one of the petitioners. I submit this affidavit in reply to the affidavit submitted by Respondent's lawyer in opposition to our motion. That affidavit reveals that Respondent has not been acting in good faith. It reveals that Respondent has gambled with our capital--but seeks to have the Court sanction its "heads I win, tails you lose" position.

Respondent now states that its \$9.00 offer for each of our approximately 75,000 shares would have involved an expenditure of \$675,000, which was not permissible under its loan agreements. Respondent had made no mention of this restriction on the motion before Mr. Justice Murtagh. If such expenditure were not permissible, Respondent should not have made its \$9.00 offer. It should have abandoned the proposed merger, even before such offer was made on August 18, 1972.

Respondent did not abandon the proposed merger.

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

It knew its \$9.00 offer was inadequate and that it would not be accepted. On the date of the offer, August 18, 1972, the shares were trading at \$10.375. Three months earlier, in May, 1972, Respondent's published first quarter annual report (Exhibit 3) showed a 50% increase in sales and approximately 10% increase in net income per share.

Respondent had from September 18 through October 7, 1972 within which to commence the valuation proceeding. It did not do so. The reason is obvious. During that period, the price at which the shares were traded was below \$10.00. Hence, Respondent was not about to pay for shares which were being traded below the amount that it would be required to pay, i.e., the value as of May 24, 1972.

We then had to commence these valuation proceedings. In answer to our petition, Respondent asked for additional time, claiming that it was negotiating a loan. It gave no details of the negotiations.

Nevertheless, just about two weeks before Mr. Justice Murtagh's decision, Respondent's president made a public announcement, which appeared in the Dow Jones

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

publications. It read as follows: (Exhibit 4)

ARROW ELECTRONICS INC. EXPECTS TO COMPLETE ARRANGEMENTS FOR AN \$8.4 MILLION LOAN BY DEC 28, B. DUKE GLENN JR. PRESIDENT TOLD DOW JONES, BEFORE ADDRESSING FINANCIAL ANALYSTS HERE.

THE LOAN IS FOR 15 YEARS AND IS WITH PRUDENTIAL INSURANCE CO OF AMERICA AND MARINE MIDLAND BANK-N.Y. THE PACKAGE REFINANCES ALL OUR CURRENT BANK DEBT AND ALL OUR FUNDED DEBT AND TAKES CARE OF THE COMPANY'S FINANCING NEEDS FOR THE NEXT THREE YEARS, GLENN SAID.

HE PREDICTED 1972 VOLUME WILL BE SOMETHING OVER \$46 MILLION UP FROM A PREVIOUS PROJECTION OF \$45 MILLION AND FROM 1971 VOLUME OF \$35.3 MILLION.

HE REITERATED THAT EARNINGS WILL BE ABOUT \$1.7 MILLION OR \$1.10 A SHARE VS \$1.4 MILLION OR 97C FOR 1971.

THE COMPANY SAID IT IS THE NATION'S SEVENTH LARGEST DISTRIBUTOR OF INDUSTRIAL ELECTRONIC COMPONENTS WITH ABOUT 2 PC OF THE MARKET.

GLENN PREDICTED 1973 EARNINGS WILL BE WELL UP OVER THIS YEAR BUT HOW MUCH UP WE LIKE TO RESERVE JUDGMENT ON UNTIL NEXT JUNE OR JULY. ASKED WHY THE COMPANY'S STOCK PRICE-EARNINGS RATIO HAS BEEN HOVERING ABOUT 9 GLENN REPLIED 'WE DON'T THINK PEOPLE YET KNOW ABOUT THE TREMENDOUS GROWTH POTENTIAL AND STATISTICS OF THE INDUSTRIAL ELECTRONIC COMPONENTS DISTRIBUTION INDUSTRY.'

Mr. Justice Murtagh did afford the Respondent additional time. Immediately upon publication of Mr. Justice Murtagh's decision of January 4, 1973, we requested information with respect to the loan and its negotiations (Exhibit 1). None was given.

On the date of the publication of the decision,

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

Mr. Glenn telephoned me with a view toward settlement. We arranged for our attorneys to meet.

Respondent's attorney states that in January, 1973 new projections were submitted to management, forecasting sales for 1973 up from \$52 million to \$58 million, which would require an additional \$2 million in working capital. Hence, the repurchase of our shares, even at \$9.00 per share, the answering affidavit states, would deprive Respondent of the additional needed capital. Yet, it the Respondent's attorney who, on January 29, 1973, conveyed to our attorney the Respondent's unconditional offer to repurchase at \$9.75 per share.

Respondent states that on January 31, 1973 its board of directors met and resolved to abandon its corporate merger with its wholly owned Delaware "shell" corporation. Why? On that day Respondent's shares had fallen below their offered price of \$9.00 per share and they were being traded at \$8.625 per share. Two days later, on February 2, 1973, when Respondent's letter was delivered to us, the shares were being traded at \$8.375. Now, the shares are trading for about \$7.75. It was not economically advantageous to repurchase.

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

They gambled with our capital investment to our detriment.

For the reasons set forth in the moving affidavit, and because Respondent had not revealed to Mr. Justice Murtagh its loan restrictions, making it impermissible to make an expenditure for which it had made its \$9.00 offer, and because Respondent has not acted in good faith, we respectfully request that we be restored to our original position, by allowing us interest on our investment, along with counsel fees, as requested in the moving papers.

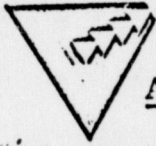
MAURICE GOLDBERG

(Sworn to March 4, 1973.)

EXHIBIT 3

ATTACHED TO AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION IN
STATE COURT PROCEEDING AFTER DEFENDANT'S ABANDONMENT OF MERGER

News



Arrow Electronics, Inc.

ARROW ELECTRONICS ANNOUNCES RECORD
FIRST QUARTER RESULTS

New York, New York, May 11, 1972 - Arrow Electronics, Inc. reported that the three months ended March 31, 1972 produced the highest sales and earnings of any first quarter on record. Net income was \$397,114 (\$.26 per common share) compared with \$338,131 (\$.24 per common share) in the first quarter of 1971. Net sales for the 1972 period were \$10,625,179, compared with \$6,710,535 in last year's first quarter.

B. Duke Glenn, Jr., President of Arrow, said that the 58 percent increase in sales was primarily attributable to the growth of Arrow's electronic distribution business. Similar gains are expected to be achieved in the second quarter, he said.

* * * * *

Three Months Ended March 31

	<u>1972</u>	<u>1971</u>
Net Sales	\$10,625,179	\$6,710,535
Income before Provision for Federal Income Tax . . .	730,294	642,595

Exhibit 3

Attached to Affidavit in Support of Petitioners' Motion in
State Court Proceeding after Defendant's Abandonment of Merger

	<u>1972</u>	<u>1971</u>
Provision for Federal Income		
Tax	333,180	304,464
Net Income.	397,114	338,131
Net Income per Common Share . .	\$.26	\$.24
Average Number of Common Shares		
Outstanding during the		
Periods.	1,524,215	1,406,294

This interim report is subject to
independent audit and adjustment
at year end.

For release: IMMEDIATELY

Confirmation: John C.Waddell
(212)952-1760

EXHIBIT 4

ATTACHED TO AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION IN
STATE COURT PROCEEDING AFTER DEFENDANT'S ABANDONMENT OF MERGER

ARROW ELECTRONICS -2-

ATLA -DJ- ARROW ELECTRONICS INC
EXPECTS TO COMPLETE ARRANGEMENTS FOR
AN \$8.4 MILLION LOAN BY DEC 28 B. DUKE
GLENN JR PRESIDENT TOLD DOW JONES BEFORE
ADDRESSING FINANCIAL ANALYSTS HERE.

THE LOAN IS FOR 15 YEARS AND IS WITH
PRUDENTIAL INSURANCE CO OF AMERICA AND
MARINE MIDLAND BANK-N.Y. THE PACKAGE
'REFINANCES ALL OUR CURRENT BANK DEBT AND
'ALL OUR FUNDED DEBT' AND TAKES CARE OF
THE COMPANY'S FINANCING NEEDS FOR THE
NEXT THREE YEARS GLENN SAID.

HE PREDICTED 1972 VOLUME WILL BE
'SOMETHING OVER \$46 MILLION' UP FROM A
PREVIOUS PROJECTION OF \$45 MILLION AND
FROM 1971 VOLUME OF \$35.3 MILLION.

HE REITERATED THAT EARNINGS WILL BE
ABOUT \$1.7 MILLION OR \$1.10 A SHARE
VS \$1.4 MILLION OR 97C FOR 1971.

THE COMPANY SAID IT IS THE NATION'S
SEVENTH LARGEST DISTRIBUTOR OF INDUSTRIAL
ELECTRONIC COMPONENTS WITH ABOUT 2 PC
OF THE MARKET.

GLENN PREDICTED 1973 EARNINGS WILL BE
'WELL UP OVER THIS YEAR BUT HOW MUCH
UP WE LIKE TO RESERVE JUDGMENT ON
UNTIL NEXT JUNE OR JULY.' ASKED WHY
THE COMPANY'S STOCK PRICE-EARNINGS
RATIO HAS BEEN HOVERING ABOUT 9 GLENN
REPLIED 'WE DON'T THINK PEOPLE YET KNOW
ABOUT THE TREMENDOUS GROWTH POTENTIAL
AND STATISTICS OF THE INDUSTRIAL ELEC-
TRONIC COMPONENTS DISTRIBUTION INDUSTRY.'

-O- 12 18 PM EST

AFFIDAVIT IN SUPPORT OF PETITIONERS' MOTION
IN STATE COURT PROCEEDING AFTER
DEFENDANT'S ABANDONMENT OF MERGER

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAMUEL M. SPRAFKIN, being duly sworn, deposes
and says:

I am Petitioners' attorney. I submit this affidavit and the following schedule of services in support of the annexed application.

I have been practicing law continuously for upwards of thirty-eight years, except for a brief period of two years while in the Air Corps during World War II. I maintain a complete suite of offices for the practice of law at 230 Park Avenue, New York, N.Y. My practice has regularly involved publicly owned stock corporations.

I am familiar with the fair and reasonable value of legal services and particularly of the type rendered herein. In the performance of the services enumerated, I was assisted by my associate, Mandel M. Einhorn, Esq. Mr. Einhorn also has been practicing law since 1934. He, too, is familiar with corporate law and practice. He has been associated with me for approximately twenty years.

In my opinion, the fair and reasonable value of

Affidavit in Support of Petitioners' Motion
in State Court Proceeding After
Defendant's Abandonment of Merger

the services rendered by us for and on behalf of the Petitioners in connection with this matter is no less than \$10,000. We expended approximately 100 hours in the performance of these services. For such services our hourly charge is \$100.00. The disbursements consisted of the usual \$25.00 index number fee and photocopies of papers.

Annexed hereto and made a part hereof is the schedule of our services.

SAMUEL M. SPRAFKIN

(Sworn to February 12, 1973.)

SCHEDULE OF SERVICES ANNEXED TO AFFIDAVIT IN SUPPORT OF
PETITIONERS' MOTION IN STATE COURT PROCEEDING AFTER
DEFENDANT'S ABANDONMENT OF MERGER

Date	Time
5-11-72 Received proxy statement and papers from client. Examined contents.	4 hrs.
5-16-72 Review of procedure to be followed under Sect. 623 B.C.L. in preparation for conference with client.	1.5 hrs.
5-17-72 Conference with client (M. Goldberg).	2.5 hrs.
5-18-72 Discussed Arrow's balance sheet with clients' accountant.	1 hr.
Further discussions with client.	1 hr.
5-19-72 Prepared schedule of statutory requirements.	1 hr.
5-20-72 Prepared preliminary form of written objections and conversation with client.	2 hrs.
5-22-72 Completed written objections, arranged with clients to be at office 5-23-72.	1.5 hrs.
5-23-72 Maurice, Claire and Henry Goldberg at office to sign written objections; mailed to Respondent by certified mail.	1.5 hrs.
5-25-72 Attendance with M. Goldberg at shareholder meeting. Stated all objections.	2.5 hrs.
5-29-72 Drafted form of election to dissent.	2 hrs.
6-6-72 Received from clients the notices of shareholder authorization. Complete in final form election to dissent. Mailed forms with letter to client.	2 hrs.
6-9-72 Received from clients signed elections and mailed via certified mail to Arrow.	
6-14-72 Letter to client re presentation of share certificates	.5 hrs.

Schedule of Services Annexed to Affidavit in Support of
Petitioners' Motion in State Court Proceeding After
Defendant's Abandonment of Merger

Date	Time
6-19-72 M. Goldberg delivers share certificates at office. Made memo of numbers on certificates.	.5 hrs.
7-6-72 Share certificates delivered to Arrow's attorneys and endorsed with legend.	1.5 hrs.
8-23-72 Last day to receive written offer from Arrow to purchase shares. Received letters dated 8-18-72, making offer of \$9.00 per share, conditioned on consummation of merger. These letters accompanied by copies of 1971 annual report. Examined contents and discussed with client.	1 hr.
10-7-72 20-day period ends for Arrow to start proceeding. 30-day period begins for clients to start proceeding.	
10-9-72 Preparation for proceedings under Sect. 623 B.C.L. Re-examination of statute, forms and outline of draft of petition.	7 hrs.
10-10-72 Redraft of petition. Examination of Wall Street Journals for market prices of shares for two-month period prior to 5-25-72.	7 hrs.
10-12-72 Clients here to discuss papers and sign.	3 hrs.
10-16-72 Motion papers served on Arrow.	
10-19-72 Filed motion papers with Motion Calendar Clerk, Special Term, Part 1, New York Supreme Court. Obtained index number.	
10-24-72 Conversation with Arrow's attorney. Signed stipulation.	

Schedule of Services Annexed to Affidavit in Support of
Petitioners' Motion in State Court Proceeding After
Defendant's Abandonment of Merger

Date	Time
11-2-72 Received and examined Arrow's answer to petition, affidavit in opposition and memorandum of law. Examined cases cited. Drafted outline of reply affidavit.	7 hrs.
11-4-72 Work on memo of law and reply affidavit.	7 hrs.
11-6-72 Completed reply affidavit and memo of law. Mailed copies and filed with court.	5 hrs.
11-13 thru 11-16-72 Preparation for appraisal proceeding.	14 hrs.
1-9-73 Received and studied copy of memorandum decision. Spoke to client. Prepared and mailed letter of 1-9-73. Spoke to Arrow's attorney. Arranged for conference.	2 hrs.
1-16-73 Conference with Arrow's counsel.	1 hr.
1-25-73 Telephone conversation with Arrow's counsel.	
1-29-73 Telephone conversation with Arrow's counsel.	
2-2-73 Received letter from Arrow's counsel advising of abandonment of merger.	
2-8, 2-10, 2-12-73 Preparation of motion adjudicating abandonment of Plan and Agreement of Merger, etc.	<u>10 hrs.</u>
Total Recorded Hours	96.00
Plus miscellaneous unrecorded time such as telephone conversations and the like, approx.	<u>5 hrs.</u>
Total time expended (no less than)	<u>101 hrs.</u>
<u>Disbursements</u> - County Clerk's Index No. fee	\$25.00

AFFIDAVIT IN OPPOSITION TO PETITIONERS' MOTION IN STATE COURT
PROCEEDING AFTER DEFENDANT'S ABANDONMENT OF MERGER

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Geoffrey M. Kalmus, being duly sworn, deposes
and says:

1. I am a partner in the firm of Nickerson, Kramer, Lowenstein, Nessen & Kamin, attorneys for Arrow Electronics, Inc. ("Arrow"), the respondent in this special proceeding. I make this affidavit in opposition to the motion of the petitioners, Maurice Goldberg and members of his family, for an award to them of "costs, expenses and damages," including counsel fees, totaling more than \$50,000, and an "adjudication" of Arrow's abandonment of a plan to merge with its wholly owned Delaware subsidiary -- a plan already formally terminated by Arrow's board of directors.

2. Nowhere in their moving papers do the petitioners state, or even hint at, any provision of New York statutory or common law entitling them to the relief they seek. Nonetheless, upon the premise that petitioners' claim is apparently founded upon some misreading of Business Corporation Law §623, we respond here, and in our accompanying memorandum of law, by demonstrating

Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

that no provision of §623 (or, for that matter, any other legal doctrine of which we are aware) affords a right to recovery under the circumstances at hand.

3. The facts and the prior history of the litigation can be stated in short compass.

4. Arrow is a New York corporation. Its common stock is listed and traded on the American Stock Exchange; a little more than 1,500,000 shares are outstanding.

5. In the spring of 1972 Arrow determined that its interests and those of its stockholders would be furthered by changing the state of its incorporation from New York to Delaware. Pursuant to this determination, a new Delaware subsidiary of Arrow, also called Arrow Electronics, Inc., was created and a plan and agreement for the merger of Arrow into its Delaware subsidiary was presented to Arrow shareholders for their approval at the annual meeting on May 25, 1972.

6. The merger agreement provided, in Article VII, for its abandonment by Arrow -- even after stockholder approval -- or by the new Delaware subsidiary at any time prior to its effective date, which was defined as the date that the merger agreement was filed with the

Affidavit in Opposition to Petitioners' Motion in State Court
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Secretary of State of Delaware. Among other things, this provision was designed to enable Arrow to abandon the merger in the unexpected event that the holders of so large a number of Arrow shares exercised their right to dissent that the merger became financially impracticable.

7. Though Arrow has more than 1,500 shareholders, only the petitioners dissented. In the aggregate the petitioners, all members of the Goldberg family, own approximately 75,000 shares of Arrow common stock.

8. The practical effect of the petitioners' dissent was to prevent the proposed merger from going forward last spring or summer. Even assuming that Arrow paid the petitioners about \$9 per share for their stock (a price in accord with the market over the past year or so, though not one that the petitioners were willing to accept), the outlay would have been approximately \$675,000. As Arrow's loan agreements then stood, such an expenditure was not permissible. Until Arrow was able to renegotiate its long term loan agreement with its principal institutional lender, no determination could be made whether or not the merger was possible.

Affidavit in Opposition to Petitioners' Motion in State Court
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And, even were a satisfactory new long term loan agreement negotiated, the on-going cash needs of Arrow's expanding business might render a reduction in capital of nearly three-quarters of a million dollars impracticable.

9. In October, 1972, while Arrow was engaged in negotiations for the renewal of its loan agreement, the petitioners commenced this proceeding. In it they sought an order from the Court authorizing an appraisal of their shares pursuant to BCL §623. Arrow opposed the petition, pointing out to the Court that the contemplated merger between it and its new Delaware subsidiary had not yet been consummated and might, in the end, have to be abandoned. Were such an abandonment to occur, Arrow pointed out, petitioners would plainly have no right to an appraisal under §623. Consequently, Arrow asked that the proceedings be dismissed as premature or stayed until the company finally determined whether or not to go forward with the merger.

10. In a memorandum opinion dated June 4, 1973, Justice John M. Murtagh denied the petitioners' application for an appraisal, in substance adopting the reasoning set forth in Arrow's papers. The Court wrote:

Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

" The corporate action upon which this proceeding is predicated has not yet been consummated. Respondent is seriously considering abandoning the corporate action. If the proposed action is abandoned or rescinded the shareholders will not have the right to receive payment for their shares

" The court finds that it would be premature at this time to grant the petition. Accordingly, the application is denied without prejudice to renewal in the event that the corporate action, upon which petitioners' right to dissent and to receive payment for their shares of stock in respondent is predicated, is consummated or upon a showing that the corporation's delay in either consummating or abandoning the corporate action is extended beyond a reasonable time."

11. While the petitioners' application was pending before Justice Murtagh, Arrow's negotiations for the renewal of its institutional loans were moving forward. At the same time, the regular, periodic study of the corporation's financial and budgetary needs for the near and medium term future was in progress. By late January, 1973 -- just a few weeks after Justice Murtagh's decision -- it had become clear that the conclusion of the new loan arrangements did not afford Arrow sufficient working capital to both meet its on-going

Affidavit in Opposition to Petitioners' Motion in State Court
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business needs and to buy out the petitioners' stock.*

12. Hence, on January 31, 1973, the board of directors of Arrow adopted resolutions formally abandoning the plan and agreement of merger with its Delaware subsidiary. Two days later, on February 2, I wrote to petitioners' counsel informing him of the termination of the merger plan and quoting the board resolutions in full. A copy of my February 2 letter is Exhibit 2 to the petitioners' moving papers here.

13. With these facts in mind, I turn to a consideration of the petitioners' claims for relief.

14. In essence, petitioners seek "interest on their capital" for the period from May 25, 1972 -- the date of the stockholders' meeting -- until February 2,

* In September, 1972, Arrow had projected its sales for the ensuing twelve months at approximately \$52 million. New projections submitted to management in January, 1973 forecast sales for calendar 1973 at approximately \$58 million. Based upon experience, this additional \$6 million in sales will require about \$2 million in added working capital to stock increased inventory and to carry an augmented volume of accounts receivable. The repurchase of the petitioners' stock--whether at \$9 per share, as Arrow believed was fair, or at a higher price, which petitioners sought--would deprive the company of a large portion of the additional needed working capital.

Affidavit in Opposition to Petitioners' Motion in State Court
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1973 -- the date of my letter informing their counsel that the plan of merger had been abandoned by Arrow. In addition, they ask for counsel fees of \$10,000.

15. The short and simple answer to these claims is that BCL §623 affords to dissenting stockholders a right to interest and to attorney's fees only after there has been a special proceeding in which the fair value of the dissenting shareholders' stock has been fixed. Such a proceeding itself can only take place when a merger or other corporate action giving rise to a right to dissent under the statute has actually been consummated. As the statute itself makes clear (see §623(e)), when, as happened here, the proposed corporate action is abandoned or rescinded, there is no right to an appraisal and the dissenting stockholders are simply restored to their former status as the owners of corporate shares.

16. Thus, here, the events preliminary to the ripening of a right of appraisal never occurred. Indeed, as we pointed out, Justice Murtagh denied as premature petitioners' motion for just such an appraisal proceeding.

17. As I have just indicated and as we discuss

Affidavit in Opposition to Petitioners' Motion in State Court
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in Arrow's accompanying legal memorandum, the petitioners' right to an appraisal stems solely from statute, and, since BCL §623 affords them no statutory right to damages in the event the proposed merger or other transaction is abandoned, nothing more need be said. But, even if some common law right to "damages" could be divined, based upon abstract notions of fairness, the present case would scarcely be a proper one for the invocation of such a right.

18. First, petitioners make no claim that Arrow's decision to abandon the plan of merger was made in bad faith or that, under the circumstances described in paragraphs 8 through 12 above, the time that elapsed between the stockholders' meeting and the determination to abandon the merger was excessive.*

19. Second, while petitioners ask that the Court afford them a 7.5% return on their investment in Arrow for the eight month period during which, as they put it,

* Justice Murtagh, in his decision of January 4, 1973, found that there had been no unreasonable delay by Arrow up to that time, and the actual abandonment of the merger plan came within a few weeks thereafter.

Affidavit in Opposition to Petitioners' Motion in State Court
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their investment was "frozen," no such return could, in fact, have been realized had their stock been wholly marketable throughout this period. Though Arrow's stock is traded on the American Stock Exchange, the actual volume of buying and selling from week to week and month to month is very small. Thus, a few hundred shares could be put on the market by a shareholder from time to time without materially depressing the price but any attempt to sell even a few thousand shares over a short span (to say nothing of the petitioners' 75,000 share block) would drive the market price precipitiously downward. Put simply, market considerations would have prevented the petitioners from selling their Arrow stock from May, 1972 to January, 1973 just as effectively as any legally imposed "freeze."

20. Still further considerations militate against an award of "damages" of the sort petitioners claim. While petitioners at least imply in their moving papers that, but for the freeze upon their shares imposed by BCL §623, they would have sold them at the prevailing market and reinvested the proceeds in such a fashion as to afford them a return of more than 7%, they, in fact,

Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

consistently refused Arrow's offer to pay them \$9 per share (conditioned, as provided in §623, upon consummation of the merger), as woefully inadequate. How then can petitioners seriously claim that they would have liquidated their investment in the open market in which, as the accompanying schedule shows, Arrow stock traded quite frequently below \$9 per share, and rarely much above that price -- even without taking any account of the depressing effect that the glut of petitioners' stock would have had upon the market?

21. Finally, even had Arrow consummated the proposed merger and had an appraisal proceeding ensued, petitioners would only have been entitled to interest and to counsel fees, as they seek here, in the discretion of the Court and upon a showing that the price offered for their shares by Arrow was unreasonably low. In the light of the historical prices of Arrow's stock over the past year, the contention that Arrow's \$9 per share offer was so unreasonable as to warrant an award of interest or attorney's fees would surely have been frivolous.

22. In sum, then, what the petitioners are

Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

asking the Court to award them under the guise of "damages", is a \$50,000 windfall - a financial bonanza that they could not conceivably have realized had they continued as Arrow stockholders without dissenting from the proposed merger.

23. I turn briefly to the other branch of petitioners' motion -- that which requests that the Court "adjudicate the abandonment by Arrow of its merger plan." As I have already noted, Arrow's board of directors has formally abandoned the merger. In this circumstance, no purpose would be served by a Court adjudication to this effect and, indeed, BCL §623 makes no provision for such an adjudication.

It is respectfully requested that the petitioners' motion be denied in all respects.

GEOFFREY M. KALMUS

(Sworn to February 26, 1973.)

Schedule Accompanying
Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

NATIONAL QUOTATION BUREAU
 INCORPORATED

Chicago
 San Francisco

116 Nassau Street
 New York, N.Y. 10038
 212 - 349-1800

Boston
 Los Angeles

FEBRUARY 21, 1973

A REPORT

QUOTATIONS - ON THE AMERICAN STOCK EXCHANGE AS RECORDED
 IN THE WALL STREET JOURNAL ISSUE - ARROW ELECTRONICS INC.
(NEW YORK) COMMON STOCK

<u>1972</u>	<u>SALE PRICES</u>		
	<u>HIGH</u>	<u>LOW</u>	<u>CLOSE</u>
MAY 1	10 3/8	10	10
2	10 3/8	9 7/8	9 7/8
3	10 3/8	9 7/8	10
4	10 1/4	10	10 1/8
5	10 1/4	10	10
8	10	10	10
9	9 7/8	9 1/2	9 3/4
10	10 3/8	9 7/8	10
11	10 1/2	10	10 1/4
12	10 1/4	10	10
15	10 5/8	10 1/4	10 5/8
16	10 3/4	10 1/8	10 1/8
17	10 1/8	9 7/8	10 1/8
18	10 3/8	10 1/4	10 3/8
19	10 3/8	10 1/8	10 1/8
22	10 1/8	9 7/8	9 7/8
23	10 3/8	10	10
24	10 3/8	10	10
25	10 3/4	9 7/8	10 5/8
26	10 7/8	10 3/8	10 1/2
30	10 3/8	9 7/8	10
31	10 1/8	9 5/8	10 1/8
JUNE 1	10 3/8	10	10
2	9 7/8	9 3/4	9 3/4

Schedule Accompanying
Affidavit in Opposition to Petitioners' Motion in State Court
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	HIGH	LOW	CLOSE
JUNE 5	9 3/4	9 1/8	9 1/8
6	9 1/2	9 1/4	9 3/8
7	9 3/8	9	9 1/4
8	9 1/8	8 7/8	8 7/8
9	9	8 7/8	8 7/8
12	8 7/8	8 3/4	8 3/4
13	8 7/8	8 5/8	8 7/8
14	9 3/8	8 7/8	9 3/8
15	9 3/8	9	9
16	9	9	9
19	8 7/8	8 5/8	8 3/4
20	9 1/4	9	9
21	8 7/8	8 7/8	8 7/8
22	9	8 7/8	9
23	8 7/8	9 5/8	8 7/8
26	9	8 3/4	9
27	9	8 7/8	9
28	9	8 3/4	8 3/4
29	8 3/4	8 5/8	8 5/8
30	8 7/8	8 3/4	8 7/8
JULY 3	8 7/8	8 7/8	8 7/8
5	8 7/8	8 5/8	8 3/4
6	8 7/8	8 1/2	8 1/2
7	8 5/8	8 1/2	8 5/8
10	8 1/2	8 1/2	8 1/2
11	8 3/4	8 1/2	8 5/8
12	8 3/4	8 1/2	8 5/8
13	8 1/2	8 1/2	8 1/2
14	8 5/8	8 3/8	8 5/8
17	8 5/8	8 3/8	8 3/8
18	8 1/2	8	8
19	8 3/4	8 1/2	8 3/4
20	8 3/4	8 3/8	8 5/8
21	8 1/2	8 1/2	8 1/2
24	8 3/4	8 3/8	8 1/2
25	9 1/8	8 5/8	9 1/8
26	9 3/8	9	9
27	9 3/8	9	9
28	8 3/4	8 3/8	8 1/2
31	8 1/2	8 3/8	8 1/2

Schedule Accompanying
Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

	HIGH	LOW	CLOSE
AUGUST 1	8 3/4	8 3/8	8 3/4
2	9 1/4	8 3/4	9 1/2
3	10 1/8	9 1/2	9 7/8
4	10 1/2	9 7/8	9 7/8
7	10 3/8	9 7/8	10 1/4
8	10 1/4	10	10
9	10 1/4	9 7/8	10 1/4
10	11 1/4	10 3/8	11 1/4
11	11 1/4	10 1/2	10 3/4
14	10 7/8	10 1/4	10 1/4
15	10 1/2	10	10
16	10 1/8	9 3/4	10
17	10 1/2	9 5/8	10 1/2
18	10 5/8	10 1/4	10 3/8
21	10 3/4	10 3/8	10 5/8
22	10 7/8	10 1/2	10 5/8
23	10 5/8	10 1/8	10 1/8
24	10 3/8	9 3/4	9 3/4
25	10 3/8	9 5/8	10 3/8
28	10 1/4	10	10 1/4
29	10	9 5/8	9 3/4
30	9 3/4	9 3/8	9 3/8
31	10	9 3/4	9 7/8
SEPT. 1	9 7/8	9 3/4	9 7/8
5	10 1/4	9 3/4	9 3/4
6	9 7/8	9 1/4	9 5/8
7	9 1/2	9 1/4	9 3/8
8	10	9 5/8	9 7/8
11	10 1/4	9 3/4	9 7/8
12	9 7/8	9 1/4	9 3/8
13	9 1/2	9 1/4	9 1/2
14	9 5/8	9 1/4	9 1/4
15	9 3/4	9 1/4	9 5/8
18	9 3/4	9 3/8	9 3/8
19	9 3/8	9 1/4	9 1/4
20	9 1/4	9 1/8	9 1/8
21	9	8 7/8	8 7/8
22	9	8 7/8	8 7/8
25	8 7/8	8 1/2	8 1/2
26	8 7/8	8 1/2	8 3/4
27	9 3/4	8 3/4	9 3/4

Schedule Accompanying
Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

	HIGH	LOW	CLOSE
SEPT. 28	9 3/4	9 3/8	9 3/8
29	8 7/8	9 1/4	9 1/4
OCT. 2	9 1/8	9 1/8	9 1/8
3	9 1/8	9 1/8	9 1/8
4	9 1/8	9	9
5	9 1/8	8 3/4	9 1/8
6	9	8 3/4	8 3/4
9	8 3/4	8 3/4	8 3/4
10	8 7/8	8 3/4	8 3/4
11	8 3/4	8 5/8	8 5/8
12	8 3/4	8 1/2	8 5/8
13	8 3/4	8 3/8	8 1/2
16	8 1/2	8 3/8	8 1/2
17	8 1/2	8 3/8	8 3/8
18	8 5/8	8 3/8	8 1/2
19	8 3/4	8 1/2	8 3/4
20	8 5/8	8 1/4	8 3/8
23	8 7/8	8 1/4	8 3/8
24	8 1/2	8	8 3/8
25	8 3/4	8 1/4	8 3/8
26	8 3/4	8 3/8	8 5/8
27	8 3/4	8 3/8	8 3/8
30	8 3/8	8 1/4	8 3/8
31	8 7/8	8 1/2	8 7/8
NOV. 1	9 5/8	8 7/8	9 3/8
2	9 3/4	9 1/8	9 3/4
3	10 1/8	9 5/8	9 3/4
6	10 1/8	9 3/8	10 1/8
7 - STOCK EXCHANGES CLOSED			
8	10 1/8	9 1/4	9 5/8
9	9 7/8	9 3/8	9 7/8
10	9 5/8	9	9 1/8
13	9 1/2	9	9 1/4
14	9 1/2	9 1/4	9 1/2
15	9 3/4	9	9
16	9 7/8	9 1/4	9 7/8
17	10 1/4	8 7/8	9 7/8
20	9 7/8	9 5/8	9 3/4
21	10 1/4	9 3/4	10
22	10 7/8	10 1/4	10 3/4
23 - HOLIDAY			

Schedule Accompanying
Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

	HIGH	LOW	CLOSE
NOV. 24	10 3/4	10 3/8	10 3/8
27	10 1/2	10 1/4	10 3/8
28	10 7/8	10 3/8	10 5/8
29	10 5/8	10 1/8	10 1/4
30	10 2/8	10	10 3/8
DEC. 1	10 3/8	9 7/8	10 1/4
4	10 7/8	10 1/8	10 3/4
5	11	10 5/8	11
6	11 1/4	10 7/8	11
7	11	10 1/2	10 3/4
8	10 7/8	10 1/2	10 1/2
11	10 3/4	10 1/2	10 5/8
12	11	10 3/8	10 3/8
13	10 5/8	10 1/4	10 1/4
14	10 5/8	10 1/8	10 1/8
15	10 1/4	10 1/8	10 1/4
18	10 1/8	9 3/4	10
19	10 3/8	9 7/8	10 1/4
20	10 1/2	10	10 1/4
21	10 1/4	9 3/4	9 3/4
22	10 1/8	9 5/8	10 1/8
25 - HOLIDAY			
26	10	9 3/4	9 3/4
27	10 1/8	9 5/8	10 1/8
28 - STOCK EXCHANGES CLOSED			
29	10 1/2	9 7/8	10
<u>1973</u>			
JAN. 1 - HOLIDAY			
2	10 5/8	10 1/4	10 1/2
3	10 3/4	10 3/8	10 3/8
4	10 3/4	10 3/8	10 1/2
5	10 3/4	10 1/4	10 1/4
8	10 1/4	9 7/8	10 1/4
9	10 1/2	9 3/4	9 3/4
10	10 1/8	9 3/4	9 3/4
11	10 1/8	9 1/2	9 3/4
12	9 5/8	9 3/8	9 5/8
15	9 5/8	9 1/8	9 1/8
16	9 3/8	9 1/4	9 1/4
17	9 1/8	8 7/8	9
18	9	8 5/8	8 7/8

Schedule Accompanying
Affidavit in Opposition to Petitioners' Motion in State Court
Proceeding after Defendant's Abandonment of Merger

<u>1973</u>	HIGH	LOW	CLOSE
JAN. 19	9	8 3/4	8 7/8
22	8 7/8	8 3/4	8 3/4
23	8 3/4	8 3/4	8 3/4
24	9 1/2	9	9 3/8
25 - STOCK EXCHANGES CLOSED			
26	9 3/8	9 1/4	9 1/4
29	9 1/4	9 1/4	9 1/4
30	9 3/8	9	9
31	8 7/8	8 5/8	8 5/8
FEB. 1	8 7/8	8 3/8	8 3/8

NOTE - THE ABOVE QUOTATIONS REPRESENT PRICES BETWEEN DEALERS AND DO NOT INCLUDE RETAIL MARK-UP, MARK-DOWN OR COMMISSION. THEY DO NOT REPRESENT ACTUAL TRANSACTIONS, AND HAVE NOT BEEN ADJUSTED FOR STOCK DIVIDENDS OR SPLITS.

NATIONAL QUOTATION BUREAU, INC.

DOMINICK DE QUARTO
LIBRARY MANAGER

DD:j

ORDER OF CHIMERA, J. IN STATE COURT PROCEEDING ON PETITIONERS'
MOTION AFTER DEFENDANT'S ABANDONMENT OF MERGER

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM
PART 1, NEW YORK COUNTY at the Courthouse thereof,
60 Centre Street, New York, New York 10007.

Present:
Hon. THOMAS C. CHIMERA, Justice.

(SAME TITLE)

The following papers numbered 1 to 12 read on this motion,
submitted No. 71 on Calendar of March 12, 1973

	<u>Papers Numbered</u>
Notice of Motion and Affidavits Annexed....	1 - 5
Answering Affidavit and exhibits.....	6 - 7
Replying Affidavit and exhibits.....	8 - 10
Rejoinder Affidavit.....	11
Sur-Rejoinder Affidavit.....	12

Upon the foregoing papers this motion is decided
in accordance with accompanying memorandum decision.

Dated 3/28/72

THOMAS C. CHIMERA

J.S.C.

Briefs: Petitioners' X

Respondent's X

County Clerk's No. 22146, 1972

Spec I Liber G14 Line 10, 1973

FILED

Apr 2 1973

NEW YORK
CO. CLERK'S OFFICE

MEMORANDUM DECISION OF CHIMERA, J. IN STATE COURT PROCEEDING
ON PETITIONERS' MOTION AFTER DEFENDANT'S
ABANDONMENT OF MERGER

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM : PART I

(SAME TITLE)

CHIMERA, J.:

In this summary proceeding petitioners sought to enforce their appraisal rights (Business Corporation Law Section 623). Their application was denied by order of the court dated June [sic] 4, 1973 which held in part:

"The corporate action upon which this proceeding is predicated has not yet been consummated. Respondent is seriously considering abandoning the corporate action. If the proposed action is abandoned or rescinded the shareholders will not have the right to receive payment for their shares

"The court finds that it would be premature at this time to grant the petition. Accordingly, the application is denied without prejudice to renewal in the event that the corporate action, upon which petitioners' right to dissent and to receive payment for their shares of stock in respondent is predicated, is consummated or upon a showing that the corporation's delay in either consummating or abandoning the corporate action is extended beyond a reasonable time."

The respondent has admittedly abandoned the corporate action objected to by the petitioners and the petitioners now seek to recover interest at a rate of 7.5% based either upon the computed average market price

Memorandum Decision of Chimera, J. in State Court Proceeding
on Petitioners' Motion after Defendant's
Abandonment of Merger

of their shares or the price previously offered by respondent for their shares, for the period from the shareholders' authorization date, May 25, 1972 to the date the proposed corporate action was abandoned (February 2, 1973). The petitioners also seek to recover counsel fees incurred in this proceeding.

The rights of dissenting shareholders upon the abandonment of corporate action, to which they have objected, is set forth in Business Corporation Law Section 623(e) which provides in part:

"If ... the proposed corporate action is abandoned or rescinded, ... , or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the filing of this notice of election, including any intervening preemptive rights and right to payment of any intervening dividend or other distribution or, if any such rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion,"

No basis exists pursuant to Business Corporation Law Section 623 for awarding interest to shareholders upon the loss of their dissenters' rights, and the

Memorandum Decision of Chimera, J. in State Court Proceeding
on Petitioners' Motion after Defendant's
Abandonment of Merger

petitioners have failed to establish an equitable cause of action for such an award. In spite of petitioners' conclusory allegations of bad faith on the part of the respondent, proof is insufficient to establish that this is the case. Accordingly, petitioners' claim for an award of interest in the specified amount is denied.

The court may in its discretion award counsel fees to the petitioners (Business Corporation Law Section 623 (h)(7).) Since the corporate action opposed by the petitioners made this proceeding necessary and since the petitioners are now foreclosed from the relief which they originally sought by virtue of the respondent's unilateral decision to abandon that action, and considering all of the circumstances surrounding this proceeding, the court concludes that the petitioners are entitled to recover reasonable counsel fees. The issue of the reasonable attorneys' fees incurred by the petitioners is referred to Hon. Frank J. McNabb, a Special Referee of this court to hear and report thereon together with recommendations. Pending the report of the referee, that portion of the motion seeking attorneys' fees is held in abeyance. Counsel are directed

141a

Memorandum Decision of Chimera, J. in State Court Proceeding
on Petitioners' Motion after Defendant's
Abandonment of Merger

to serve a copy of this order within five days from
publication on the Office of the Referees, Room 308M.

Dated: March 28, 1973

THOMAS C. CHIMERA

J. S. C.

FILED

APR 2 1973

NEW YORK

CO. CLERK'S OFFICE

APPELLATE DIVISION ORDER AFFIRMING ORDER OF
MURTAGH, J. IN STATE COURT PROCEEDING

At a term of the Appellate Division of the
Supreme Court held in and for the First
Judicial Department in the County of New
York, on September 20, 1973.

Present:

Hon. HAROLD A. STEVENS, Presiding Justice,
ARTHUR MARKEWICH,
EMILIO NUNEZ,
FRANCIS T. MURPHY, JR.,
GEORGE TILZER, Justices.

(SAME TITLE)

7269N

An appeal having been taken to this Court by
the petitioners-appellants from an order of the Supreme
Court, New York County (Murtagh, J.), entered on
January 8, 1973, denying, without prejudice, petitioners'
application to determine the value of the common shares
in respondent owned by each of the petitioners, and
said appeal having been argued by Mr. S.M. Sprafkin
of counsel for the appellants, and by Mr. Geoffrey M.
Kalmus of counsel for the respondent; and due deliber-
ation having been had thereon,

It is unanimously ordered that the order so
appealed from be and the same is hereby affirmed.
Respondent shall recover of appellants \$40 costs and
disbursements of this appeal.

E N T E R :

HYMAN W. GAMSO, Clerk.

APPELLATE DIVISION ORDER MODIFYING ORDER OF
CHIMERA, J. IN STATE COURT PROCEEDING

At a term of the Appellate Division of
the Supreme Court held in and for the
First Judicial Department in the County
of New York, on September 20, 1973.

Present:

Hon. HAROLD A. STEVENS, Presiding Justice,
ARTHUR MARKEWICH,
EMILIO NUNEZ,
FRANCIS T. MURPHY, JR.,
GEORGE TILZER, Justices.

(SAME TITLE)

7270N

Cross-appeals having been taken to this Court
by the respondent-appellant-respondent and by the
petitioners-respondents-appellants from so much of an
order of the Supreme Court, New York County (Chimera,
J.), entered on April 2, 1973, as set forth in the
notice of appeal and notice of cross-appeal, and said
appeal having been argued by Mr. Geoffrey M. Kalmus,
of counsel for the respondent-appellant-respondent, and
by Mr. S.M. Sprafkin, of counsel for the petitioners-
respondents-appellants; and due deliberation having
been had thereon, and upon the memorandum decision of
this Court filed herein,

It is unanimously ordered that the order so
appealed from be and the same is hereby modified, on
the law and the facts, to strike therefrom the pro-

Appellate Division Order Modifying Order of
Chimera, J. in State Court Proceeding

vision for counsel fee and to vacate the reference to
fix the amount thereof, and otherwise affirmed, without
costs and without disbursements.

E N T E R :

HYMAN W. GAMSO

Clerk.

FILED SEP 20 1973

OPINION OF APPELLATE DIVISION DISPOSING OF APPEALS
FROM ORDERS IN STATE COURT PROCEEDING

Stevens, P.J., Markewich, Nunez, Murphy, Tilzer, JJ.

(SAME TITLE)

7269N

Order, Supreme Court, New York County (Murtagh, J.), entered January 8, 1973, unanimously affirmed. Respondent shall recover of appellants \$40 costs and disbursements of this appeal.

Order filed.

7270N

Order, Supreme Court, New York County (Chimera, J.), entered April 2, 1973, unanimously modified, on the law and the facts, to strike therefrom the provision for counsel fee and to vacate the reference to fix the amount thereof, and otherwise affirmed, without costs and without disbursements.

Petitioners-appellants, holders of approximately five percent of the stock of the corporate respondent, and objectants to a proposed merger proposal, instituted a valuation proceeding (section 623, Business Corporation Law). Special Term found that the merger, not yet consummated, might well be abandoned, and that respondent was not proceeding untimely, and, concluding that the proceeding was premature, denied

Opinion of Appellate Division Disposing of Appeals
from Orders in State Court Proceeding

the application without prejudice to renewal either upon the merger's consummation or the passage of an unreasonable period of time without either consummation or abandonment. The first appeal is from that order; it is affirmed.

Less than two months after the filing of that order, the merger plan having been formally abandoned in the interim, petitioners moved for fixation of interest on the value of their stock for the period running from authorization of the merger to its abandonment. Special Term denied that branch of the application, finding no authorization therefor, in the circumstances disclosed, in the statute (see section 623[e].) It was specifically found--and we agree--that respondent's claimed bad faith had not been proven. At the same time, however, the court granted an accompanying request for counsel fee, citing as authority section 623(h)(7), and referring the issue of amount thereof to court's special referee. Respondent appealed from the award of counsel fee; petitioners, from denial of interest. We reverse as to the first and affirm as to the second. The statutory scheme for regulation of

Opinion of Appellate Division Disposing of Appeals
from Orders in State Court Proceeding

corporate mergers and particularly the comprehensive provisions thereof for protection of dissenting stockholders do not, in the circumstances found here, make any provision in either cited subdivision of the section or anywhere else for either the relief granted or withheld by Special Term. The application should have been denied in toto.

Order filed.

NOTICE OF APPEAL TO NEW YORK STATE COURT OF APPEALS

(Same Caption)

PLEASE TAKE NOTICE that Petitioners hereby appeal to the Court of Appeals from the final order of the Appellate Division of the Supreme Court, First Department, dated September 20, 1973 and filed in the Office of the Clerk of said Appellate Division on September 20, 1973, which order substantially modified, on the law and facts, the order of the Supreme Court, New York County, entered April 2, 1973, by denying to Petitioners all relief requested; and upon said appeal, Petitioners will bring up for review the order of said Appellate Division, entered in the office of its Clerk on September 20, 1973, which order affirmed an intermediate order of the Supreme Court, New York County, entered in the Office of the Clerk thereof on January 8, 1973; and this appeal is taken from the whole and each and every part of the aforesaid orders.

PLEASE TAKE FURTHER NOTICE that upon this appeal Petitioners will assert that the statute, Section 623 of the Business Corporation Law, as construed by the Appellate Division, is unconstitutional.

Notice of Appeal to New York State Court of Appeals

Dated: New York, N.Y.
October 18, 1973

SAMUEL M. SPRAFKIN
Attorney for Petitioners
230 Park Avenue
New York, N.Y. 10017
(212) 689-2580

To:
NICKERSON, KRAMER, LOWENSTEIN,
NESSEN & KAMIN, ESQS.
Attorneys for Respondent
919 Third Avenue
New York, N.Y. 10022
(212) 688-1100

ATTORNEY GENERAL OF THE STATE
OF NEW YORK
State Capitol
Albany, N.Y. 12224

CLERK OF THE COURT

DEFENDANT'S NOTICE OF MOTION IN NEW YORK
COURT OF APPEALS TO DISMISS APPEAL

(Same Caption)

Please take notice that, upon record and briefs filed in this Court and in the Appellate Division, First Department, and the annexed affirmation of George L. Graff, dated January 15, 1974, the undersigned will move this Court at the Court of Appeals Hall, Albany, New York, on January 28, 1974, at 2:00 p.m. or as soon thereafter as counsel can be heard, for an order dismissing the appeal in this action on the grounds

(a) that the order appealed from is not a final order within the meaning of the constitution, and

(b) that the order brought up for review is not appealable as of right to this Court.

Dated: New York, New York
January 15, 1974

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll
Attorneys for Respondent
919 Third Avenue
New York, New York 10022
212/688-1100

To: Samuel M. Sprafkin
Attorney for Petitioners
230 Park Avenue
New York, New York 10017

DECISION OF THE NEW YORK COURT OF APPEALS GRANTING DEFENDANT'S
MOTION AND DISMISSING APPEAL ON GROUND THAT ORDERS
ARE NOT APPEALABLE AS OF RIGHT

DECISION COURT OF APPEALS FEB 15 1974

1 Mo. No. 78
 In the Matter of
the Application of Maurice
Goldberg, individually &c.,
&ors. &c., Appellants,
to determine their rights &c.
Arrow Electronics, Inc., Respondent,
under Section 623 of the Busi-
ness Corporation Law.

Motion to dismiss the appeal herein
granted and the appeal dismissed,
without costs, upon the ground that
the order appealed from does not
finally determine the proceeding
within the meaning of the
Constitution.

PLAINTIFFS' NOTICE OF MOTION IN THE APPELLATE DIVISION
FOR RECONSIDERATION OR LEAVE TO APPEAL TO THE COURT OF APPEALS

(Same Caption)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of SAMUEL M. SPRAFKIN, sworn to February 22, 1974, the Record on Appeal herein, the proceedings in the Court of Appeals, and all other papers herein, Petitioners will move this Court, at a term thereof to be held at the Courthouse, 25th Street and Madison Avenue, in the Borough of Manhattan, City of New York, on March 4, 1974, for an order granting

1. reconsideration by this Court of its decisions of September 20, 1973; and if reconsideration is denied or, if granted, and the decisions remain unchanged, then

2. permission to appeal to the Court of Appeals from

- (i) the order of this Court in 7269N, and certifying that in this Court's opinion a question of law is involved that ought to be reviewed by the Court of Appeals; and

- (ii) the modification order of this Court in 7270N, and certifying the three questions set forth in the accompanying affidavit; and

3. such other and further relief as may be just and proper.

Plaintiffs' Notice of Motion in the Appellate Division
for Reconsideration or Leave to Appeal to the Court of Appeals

PLEASE TAKE FURTHER NOTICE that answering papers
must be served at least five days prior to the return
day hereof.

Dated: February 22, 1974

SAMUEL M. SPRAFKIN
Attorney for Petitioners-
Appellants
230 Park Avenue
New York, N.Y. 10017
(212) 689-2580

To:
NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL, ESQS.
Attorneys for Respondent-Respondent
919 Third Avenue
New York, N.Y. 10022

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION IN THE
APPELLATE DIVISION FOR RECONSIDERATION OR LEAVE
TO APPEAL TO THE COURT OF APPEALS

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAMUEL M. SPRAFKIN, being duly sworn, deposes
and says: I am Petitioners' attorney. I submit this
affidavit and the accompanying papers in support of the
annexed motion.

1. This Court rendered its opinion and made its
orders on September 20, 1973 (Exhibits 1, 2, 3). On
October 18, 1973, Petitioners served and then filed
their Notice of Appeal to the Court of Appeals (Exhibit
4), from the modification order (Exhibit 2). In the
Notice of Appeal, Petitioners also brought up for re-
view the order (Exhibit 3), which affirmed the
January 8, 1973 order (Murtagh, J.).

2. After Petitioners had filed their Record on
Appeal and briefs in the Court of Appeals, Respondent
moved to dismiss the appeal, on the ground that the
modification order (Exhibit 2) was a non-final order
and that the final order in the proceeding was the order
(Exhibit 3) which had affirmed unanimously the prior
order of Murtagh, J.

3. On February 15, 1974, the Court of Appeals

Affidavit in Support of Plaintiffs' Motion in the
Appellate Division for Reconsideration or Leave
to Appeal to the Court of Appeals

granted Respondent's motion and dismissed the appeal (Exhibit 5).

4. Accordingly, it is necessary to proceed in this Court for permission to appeal, pursuant to CPLR §5514(a).

5. Briefly stated, the shareholders of the Respondent, other than Petitioners, had authorized Respondent to merge into a Delaware corporation, which was to be the survivor. Petitioners, as objecting shareholders, complied with the precise procedural requirements of the appraisal statute (BCL §623). When Respondent failed to institute the judicial appraisal proceeding under BCL §623(h), Petitioners did so to determine their rights and to recover the value of their shares. Thereafter, Respondent abandoned the merger.

6. In its opinion (Exhibit 1), this Court stated that "The statutory scheme for regulation of corporate mergers and particularly the comprehensive provisions thereof for protection of dissenting stockholders do not, in the circumstances found here, make any provision in either cited subdivision of the section or anywhere else for either the relief granted or withheld by Special Term." Petitioners were denied all relief.

Affidavit in Support of Plaintiffs' Motion in the
Appellate Division for Reconsideration or Leave
to Appeal to the Court of Appeals

7. We respectfully submit that the appraisal statute (BCL §623), as interpreted by this Court, is unconstitutional because: Upon abandonment of the merger during the judicial appraisal proceeding, the statute deprives Petitioners of their right to receive payment of the value of their shares. Further, upon reinstatement to shareholder status, Petitioners were not restored to the position they were in 8 months earlier, their shares having declined in value, and during the 8 months they had been deprived of their property. All this was done without due process. (See point I of the accompanying brief.)

8. In the light of the foregoing, we respectfully request that this Court reconsider its interpretation of the statute. In that respect, we submit points II and III in the accompanying brief.

9. However, should this Court refuse reconsideration or upon reconsideration adhere to the decision as rendered, then we respectfully request permission to appeal from each of the two orders made on September 20, 1973. The appraisal statute is relatively new. It has not been interpreted by the Court of Appeals. The

Affidavit in Support of Plaintiffs' Motion in the
Appellate Division for Reconsideration or Leave
to Appeal to the Court of Appeals

question of law involved is one which ought to be reviewed by it. It is in the public interest to allow the appeals. Additionally, in the interest of substantial justice, such appeals should be allowed.

10. Since it appears that the order (Exhibit 3) which affirmed the order of Murtagh, J. is the final order, we respectfully request that this Court certify that in its opinion a question of law is involved that ought to be reviewed by the Court of Appeals.

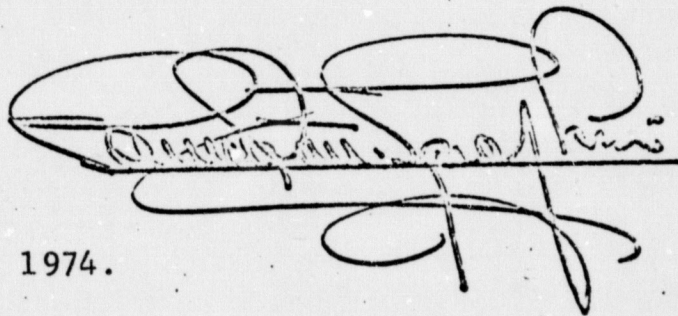
11. Because the Court of Appeals, in its decision of February 15, 1974 (Exhibit 5), held that the order of modification (Exhibit 2) was non-final, we submit that this Court certify the following questions:

(i) Having complied with the requirements of Business Corporation Law §623, including commencement of the judicial appraisal proceeding upon failure of Respondent corporation to do so, are Petitioners, as dissenting shareholders, entitled as a matter of right to go forward with the proceeding and have the value of their shares fixed with interest, expenses, costs and disbursements; and is this so, even if Respondent corporation abandons the merger during the pendency of the judicial proceeding?

Affidavit in Support of Plaintiffs' Motion in the
Appellate Division for Reconsideration or Leave
to Appeal to the Court of Appeals

(ii) Was the Supreme Court precluded from awarding Petitioners, as dissenting shareholders, their damages, interest, counsel fees, costs and disbursements when Respondent corporation abandoned the corporate merger after the judicial appraisal proceeding had been instituted by the Petitioners?

(iii) As interpreted by the Appellate Division, is Business Corporation Law §623 unconstitutional since, upon abandonment of a corporate merger during the judicial appraisal proceeding, it deprives dissenting shareholders of their right to receive payment of the value of their shares, and upon reinstatement to shareholder status, the dissenting shareholders were not restored to the position in which they had been because their shares had declined in value in the interim and, during that period of time, they were deprived of their property?



Sworn to February 22, 1974.

AFFIDAVIT SUBMITTED BY DEFENDANT IN OPPOSITION TO PLAINTIFFS'
MOTION IN THE APPELLATE DIVISION FOR RECONSIDERATION
OR LEAVE TO APPEAL

(Same Caption)

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Geoffrey M. Kalmus, being duly sworn, deposes and
says:

1. I am a member of the firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for the respondent, Arrow Electronics, Inc. ("Arrow"). I make this affidavit in opposition to the motion of the petitioners-appellants, Maurice Goldberg, members of his family, and trusts of which they are the beneficiaries, for reconsideration by the Court of its decision and orders entered September 20, 1973 or, in the alternative, for leave to appeal to the Court of Appeals from these determinations.

2. Much of the appellants' brief in support of their present motion simply reiterates the arguments advanced by them and rejected by the Court upon the original appeal. Rather than repeating the presentation that we earlier made in response to these arguments, I annex as exhibits copies of our brief and reply brief upon the appeal.

Affidavit Submitted by Defendant in Opposition to Plaintiffs'
Motion in the Appellate Division for Reconsideration
or Leave to Appeal

The motion for
reconsideration

3. Appellants' request for reargument of the Court's decision and orders of last September may be quickly disposed of. Put simply, the motion is untimely. Section 600.14(a) of the rules of this Court provides that "motions for reargument shall be made within 30 days after the appeal has been decided" These appeals were decided more than six months ago, and appellants have not suggested any reason why the Court should depart from its rule and reconsider its earlier determination so long out of time.

The motion for
leave to appeal

4. In the balance of this affidavit I will respond to the arguments that appellants advance in support of their request for leave to appeal; at the same time, I will confine myself to those matters newly raised by appellants and, hence, not dealt with in our briefs on the original appeal.

5. As we read the brief submitted in support of

Affidavit Submitted by Defendant in Opposition to Plaintiffs'
Motion in the Appellate Division for Reconsideration
or Leave to Appeal

the Goldbergs' motion, they urge two new grounds for consideration of the case by the Court of Appeals:

(i) First, they say that, as construed by the Court, Business Corporation Law §623 deprives them of due process of law and is, therefore, unconstitutional.

(ii) Second, they argue that, once appraisal proceedings have been begun by the filing of a petition in the Supreme Court, dissenting shareholders are entitled to appraisal and payment for their shares, regardless of whether the corporate action from which they have dissented is ever consummated.

Neither of these contentions is meritorious or warrants further review by the Court of Appeals.

(a) Appellants' claim
of unconstitution-
ality is frivolous

6. According to appellants, BCL §623 is unconstitutional, as interpreted by the Court, because, upon abandonment by Arrow of the corporate action from which

Affidavit Submitted by Defendant in Opposition to Plaintiffs'
Motion in the Appellate Division for Reconsideration
or Leave to Appeal

appellants elected to dissent, the statute neither afforded them the right to be paid for their shares nor restored them to precisely the position they occupied prior to their dissent. There are several simple answers to these contentions.

7. First, the terms of BCL §623 protect a dissenting shareholder against any significant deprivation of his rights during the period from his dissent to consummation or abandonment of the proposed corporate action. In the event of abandonment, §623(e) provides that the dissenter "shall be reinstated to all his rights as a shareholder as of the filing of his notice of election [to dissent], including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution" The same subsection affords a shareholder the further protection of the right unilaterally to withdraw his dissent "at any time before an offer is made by the corporation ... to pay for his shares," and, even thereafter, authorizes withdrawal if the corporation consents.* Moreover, contrary to appellants' assertions, a dissenting shareholder is not prohibited - by reason of his dissent - from selling his shares prior to the con-

Affidavit Submitted by Defendant in Opposition to Plaintiffs'
Motion in the Appellate Division for Reconsideration
or Leave to Appeal

summation or abandonment of the proposed corporate action. Section 623(f) specifically recognizes the right of dissenting shareholders to transfer their stock to others; the only qualification upon this right is the obviously necessary one that a purchaser takes subject to the benefits and burdens consequent upon the dissent itself. In sum, the statute is drawn with circumspection and, in fact, imposes no significant deprivation upon a dissenter's property rights.

8. Second, a dissenting shareholder cannot justifiably complain of a deprivation of rights by reason of his dissent, for the election to seek an appraisal is entirely his. At common law there were no dissenter's rights; such a privilege is wholly statutory (see our brief on appeal p. 9). In granting shareholders the right to dissent the Legislature was surely entitled to impose reasonable qualifications upon the right. One such qualification in §623 is that with respect to abandonment of proposed corporate action in the event that

* It is, perhaps, worth noting that, despite appellants' present protestations, they at no time sought to withdraw their dissent, with or without Arrow's consent.

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so many shareholders dissent as to make consummation of the transaction impracticable. Any shareholder choosing to dissent does so with the knowledge that the corporation may avail itself of the right to abandon its proposed action and that, in such event, he will not be entitled to payment for his shares.

9. Third, looking beyond the statutory scheme to the facts of our case, the claim of a deprivation of rights amounting to a denial of due process rings particularly hollow. As we pointed out upon the original appeal (see our brief at pp. 16-17), the Goldbergs, realistically speaking, suffered no harm through the alleged "freeze" upon their shares. Had they not dissented, they could not have sold their Arrow stock in the open market for the \$12 per share they claimed was fair, for the price of the stock never approached that height. Indeed, they could not have sold their shares at the \$9 price that Arrow conditionally offered them, for the thin trading market in Arrow stock would have prevented them from disposing of any large number of shares (they owned about 75,000), even over several months, without severely depressing the market. And, as we remarked upon the

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original appeal, it taxes credulity to suppose that the appellants, who say they regarded Arrow's \$9 per share offer as grossly inadequate, would, nonetheless, have sold out on the open market at much lower prices, if only their stock had been freely tradeable. Thus, whatever might be said in favor of a dissenting shareholder in some other circumstances, it is plain that these appellants have suffered no genuine deprivation of rights.

10. Finally, none of the cases upon which appellants rely in connection with their claim of unconstitutionality remotely supports them. The cases appellants cite, all from the Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), line of decisions, hold only that one may not be deprived of his property through an attachment, garnishment or other levy without prior notice and opportunity to be heard. Here, appellants not only had prior notice and a full hearing, but themselves elected to dissent and initiated the proceeding which they now claim led to a deprivation of their rights.

(b) Appellants mis-
construe §623

11. Appellants argue that "although there is an

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abandonment of the merger during the pendency of the judicial proceeding, the proceeding must go forward to the making of the final order" for payment for the dissenter's stock (appellants' brief upon this motion p. 28). In so contending they simply ignore those portions of §623 that negate their argument and leave unmentioned, as well, the decisions that dictate a contrary reading of the statute.

12. Both §623 and its predecessor, Stock Corporation Law §21, take account of the possibility of abandonment of proposed corporate action and provide, in substance, that, in such event, a dissenting shareholder is not entitled to an appraisal and payment for his stock but only to restoration to his prior shareholder status. Thus, §623(e) provides that "[i]f a notice of election is withdrawn, or the proposed corporate action is abandoned or rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated

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to all his rights as a shareholder" Plainly, subsection (h) of the statute, upon which appellants place so much emphasis, cannot be read in a vacuum; the qualifications to a dissenter's right to an appraisal and payment for his shares just quoted must be read along with subsection (h).

13. The mandatory use of the word "shall" in subsection (h), which appellants emphasize, does not dictate a different result or compel a reading of that subsection without reference to the rest of the statute. In fact, §623(h)(4) explicitly directs the court, in passing upon an application for an appraisal, to "determine whether each dissenting shareholder ... is entitled to receive payment for his shares." Only "if the court finds that any dissenting shareholder is so entitled," is it to "proceed to fix the value of the shares."* As is self-evident, in deciding whether a

* While appellants repeatedly quote the provision of subsection (h)(4) stating that "it [the court] shall proceed to fix the value of the shares," they ignore entirely the introductory qualifying phrase - "[i]f the court finds that any dissenting shareholder is so entitled [to payment]"

Affidavit Submitted by Defendant in Opposition to Plaintiffs'
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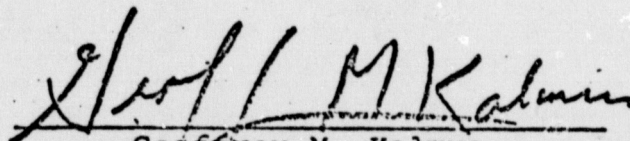
dissenter "is entitled to receive payment for his shares," the court must take account of any withdrawal of his demand for appraisal, abandonment of the proposed corporate action, or other disqualifying event.

14. The authorities upon which we relied in our reply brief on the original appeal explicitly recognized that an appraisal proceeding under §623 may not go forward willy-nilly, regardless of an abandonment or potential abandonment of proposed corporate action. Matter of Hake, 285 App. Div. 316 (4th Dep't 1955); Matter of McKinney, 306 N.Y. 207 (1954) (discussed at pp. 3-5 of our reply brief). In both the Hake and McKinney cases the courts ruled that appraisal proceedings, already in progress, should be held in abeyance pending a corporate decision either to consummate or abandon the transaction which led to the dissent. Moreover, in the McKinney case, Justice Desmond explicitly recognized that "if the corporate action should finally be abandoned, subdivision 6 of section 21 [the abandonment provision comparable to that in BCL §623(e)], would come into play" - i.e., the dissenter would have no right to an appraisal but would be restored to his shareholder status. 306 N.Y. at 214.

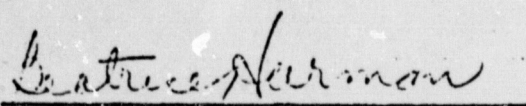
Affidavit Submitted by Defendant in Opposition to Plaintiffs'
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15. Though both the Hake and McKinney cases were decided under Stock Corporation Law §21 rather than BCL §623, the two statutes are the same in substance and deal in like fashion with the abandonment problem. Thus, the Court of Appeals has, years ago, rejected the reading of §623 that appellants now advance.

It is respectfully submitted that appellants' motion should be denied in its entirety.


Geoffrey M. Kalmus

Sworn to before
me this 27th day
of February, 1974



BEATRICE HARMAN
Notary Public, State of New York
No. 31-6712450
Qualified in New York County
Commission Expires March 30, 1974

PLAINTIFFS' MOTION IN THE NEW YORK COURT
OF APPEALS FOR LEAVE TO APPEAL

(Same Caption)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of SAMUEL M. SPRAFKIN, sworn to April 3, 1974, the record on appeal and appellant's brief previously filed herein, the decision of this Court dated February 15, 1974, the order of the Appellate Division, First Department, made and entered March 21, 1974, which denied the motion of Petitioners-Appellants for leave to appeal from the two orders of the Appellate Division, dated and entered September 20, 1973, the annexed brief and all the proceedings heretofore had herein, the undersigned will move this Court, at the Court of Appeals Hall, Eagle and Pine Streets, Albany, New York, on April 15, 1974, at 2:00 P.M. o'clock, for an order granting to the Petitioners-Appellants

1. permission to appeal to this Court from

- (i) the order of the Appellate Division made and entered September 20, 1973, which unanimously affirmed the final order of the Supreme Court, New York County (Murtagh, J.), denying Petitioners' application; and
- (ii) the order of the Appellate Division made and entered September 20, 1973, which modified the order of the Supreme Court, New York County (Chimera, J.) and denied all relief to Petitioners,

Plaintiffs' Motion in the New York Court
of Appeals for Leave to Appeal

on the ground that questions of law are presented which merit review by this Court; and

2. such other and further relief as may be just and proper.

Dated: April 3, 1974

SAMUEL M. SPRAFKIN
Attorney for Petitioners-
Appellants
230 Park Avenue
New York, N.Y. 10017

To:

NICKERSON, KRAMER, LOWENSTEIN, NESSEN,
KAMIN & SOLL, ESQS.
Attorneys for Respondent-Respondent
919 Third Avenue
New York, N.Y. 10022

HON. LOUIS J. LEFKOWITZ
Attorney General
New York City Office
World Trade Center
New York, N.Y. 10048
(constitutional question involved)

CLERK OF THE COURT

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION IN
THE NEW YORK COURT OF APPEALS FOR LEAVE TO APPEAL

(Same Caption)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAMUEL M. SPRAFKIN, being duly sworn, deposes
and says:

I am Petitioners' attorney. I submit this
affidavit and the accompanying papers in support of the
annexed motion.

1. The shareholders of the Respondent, other than
Petitioners, had authorized Respondent to merge into a
Delaware corporation, which was to be the survivor.
Petitioners, as objecting shareholders, complied with
the precise procedural requirements of the appraisal
statute (BCL §623). When Respondent failed to institute
the judicial appraisal proceeding under BCL §623(h),
Petitioners did so to determine their rights and to
recover the value of their shares.

2. Petitioners' application came on to be heard
before the Supreme Court, New York County (Murtagh, J.).
Their application was denied without prejudice to renewal
(Exhibit 1). Petitioners appealed.

3. Respondent then abandoned the merger. Thereupon
Petitioners applied for damages, counsel fees, expenses,
costs and disbursements. The Supreme Court (Chimera, J.)
denied the requested relief, except counsel fees, and

Affidavit in Support of Plaintiffs' Motion in the
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referred the issue of the amount to a special referee (Exhibit 2). Both sides appealed.

4. The appeals from both orders were heard simultaneously. On September 20, 1973 the Appellate Division made an order (Exhibit 3) which unanimously affirmed the order of Murtagh, J. It also made an order (Exhibit 4) which modified the order of Chimera, J. by denying all relief to Petitioners. (Opinion - Exhibit 5)

5. On October 18, 1973, Petitioners served and then filed a notice of appeal to this Court (Exhibit 6) from the modification order (Exhibit 4). In the notice of appeal, Petitioners also brought up for review the order (Exhibit 3) which affirmed the order of Murtagh, J. (Exhibit 1).

6. Petitioners filed their record on appeal and appellants' briefs in this Court. Respondent then moved to dismiss the appeal on the ground that the modification order (Exhibit 4) was a non-final order and that the final order in the proceeding was the order (Exhibit 3) which had affirmed unanimously the prior order of Murtagh, J.

7. On February 15, 1974, this Court granted Respondent's motion and dismissed the appeal (Exhibit 7).

Affidavit in Support of Plaintiffs' Motion in the
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8. It thus became necessary to proceed in the Appellate Division for permission to appeal, pursuant to CPLR §5514(a). On February 22, 1974, Petitioners served their motion papers returnable on March 4, 1974. In that application Petitioners also requested the Appellate Division to reconsider its decisions of September 20, 1973. Reconsideration was requested on the basis of the opinion in *BLYE v. GLOBE WERNICKE*, 33 N.Y.2d 15, 347 N.Y.S.2d 170. That opinion appeared in the New York Supplement advance sheets of September 25, 1973, which we received early in October. It is the Appellate Division's construction of BCL §623, read in the light of the opinion in *BLYE*, that poses the constitutional issue.

9. In its opinion rendered on the two orders made, the Appellate Division stated that "The statutory scheme for regulation of corporate mergers and particularly the comprehensive provisions thereof for protection of dissenting stockholders do not, in the circumstances found here, make any provision in either cited subdivision of the section or anywhere else for either the relief granted or withheld by Special Term." (Exhibit 5)

Affidavit in Support of Plaintiffs' Motion in the
New York Court of Appeals for Leave to Appeal

10. We urged the Appellate Division to reconsider because the appraisal statute (BCL §623) as interpreted by it, is unconstitutional: BCL §910 conferred upon Petitioners the right to receive payment of the value of their shares when they did not assent to the plan of merger. This right was conditioned upon their compliance with BCL §623. The judicial appraisal proceeding was pending when Respondent abandoned the merger. The statute deprived Petitioners of their right to receive payment of the value of their shares. Further, upon reinstatement to shareholder status, Petitioners were not restored to the position they were in eight months earlier. Their shares had declined in value. During the eight months they had been deprived of their property. All this was done without due process.

11. On March 21, 1974, the Appellate Division made an order (Exhibit 8) which denied reconsideration of its decisions and denied permission to appeal to this Court.

12. In the annexed brief, we demonstrate that novel and important questions of law of general application are presented. They merit review by this Court. The appraisal statute (BCL §623) was rewritten in its entirety upon the adoption of the Business Corporation

Affidavit in Support of Plaintiffs' Motion in the
New York Court of Appeals for Leave to Appeal

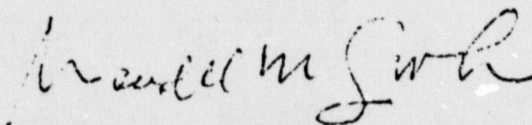
Law. This Court has not ruled on the interpretation of the appraisal statute. We submit that the language of the appraisal statute does not support the interpretation of the Appellate Division. However, if that interpretation is permitted to stand, then the statute automatically deprives dissenting shareholders of their rights by Respondent's unilateral act of abandoning the merger after the judicial proceeding had been instituted.

WHEREFORE, it is respectfully requested that Petitioners-Appellants be granted leave to appeal to this Court from the two orders of the Appellate Division.



SAMUEL M. SPRAFKIN

Sworn to before me this
 3rd day of April, 1974.



MANDEL M. EINHORN
 Notary Public, State of New York
 No. 0107 07025
 County of New York
 Commission Expires 12/31/1975

DECISION OF THE NEW YORK COURT OF APPEALS
DENYING PLAINTIFFS' MOTION FOR
LEAVE TO APPEAL

DECISION COURT OF APPEALS MAY 1 - 1974

Mo. No. 345

In the Matter of
the Application of Maurice
Goldberg, individually &c.,
ors. &c., Appellants,
to determine their rights as
dissenting shareholders &c.,
Arrow Electronics, Inc.,
Respondent,
under Section 623 of the Busi-
ness Corporation Law.

Motion for leave to appeal denied
with ten dollars costs and necessary
reproduction disbursements.

MEMORANDUM OF DECISION AND ORDER OF MISHLER, C.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 1077

MAURICE GOLDBERG, et al.,

Plaintiffs,

-against-

Memorandum of Decision
and OrderARROW ELECTRONICS, INC., and
STATE OF NEW YORK,

Defendants.

November 13, 1974

In this civil rights action, plaintiffs challenge the constitutionality of section 623 of the Business Corporation Law of New York (McKinney's 1963) claiming that this statute deprived them of property without due process of law.

The facts relevant to the disposition of this action can be briefly summarized. Defendant Arrow Electronics, Inc.,^{/1} is a New York corporation in which the plaintiffs are stockholders. In its regular proxy statement,

^{/1} Although the State of New York voluntarily appeared in this action, the State's involvement in the events preceding the filing of this action was quite minor. Consequently, all references herein to "defendant" refer to Arrow Electronics, Inc. only.

Memorandum of Decision and Order of Mishler, C.J.

issued in April 1972, defendant notified its shareholders that it would propose a merger plan for corporate adoption at the next shareholders meeting. The stockholders were advised that the plan on which they were to vote would become effective only in the event that the proposed merger was actually completed. Plaintiffs opposed the merger and voted against adoption of the plan, which was nonetheless approved.

Pursuant to section 623 of the Business Corporation Law (BCL), plaintiffs filed a written notice of election to invoke their rights as dissenting shareholders. Under section 623(h)(4) of the BCL, shareholders who properly file objection and notice of election become entitled to payment of the fair value of their shares, determined as of the day before approval of the action by the shareholders (here May 24, 1972). Since this date, the market value of the shares steadily declined. Perhaps as a result of this fact the parties were unable to reach an agreement as to the fair value of the shares, and plaintiffs initiated a proceeding in state court to fix the value of the shares. However, on January 31, 1973, defendant abandoned the merger proposal and refused to

Memorandum of Decision and Order of Mishler, C.J.

pay plaintiffs for their shares, relying on section 623(e) of the BCL. This provision of the statute makes the right of dissenting shareholders to receive payment for their shares contingent upon completion of the merger.^{/2} Plaintiffs' state court action to fix the value and be paid for their shares was denied on the basis of section 623(e).^{/3}

^{/2} Section 623(e) provides in pertinent part:

If . . . the proposed corporate action is abandoned . . . (the shareholder) shall not have the right to receive payment for his share and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election

^{/3} Plaintiffs actually initiated two state court proceedings. In the first, commenced on October 12, 1972, plaintiffs sought to have the value of their shares fixed, and to require defendants to pay them this amount. This request was denied on the ground that it was premature since plaintiffs had only a contingent right to payment until the merger was completed. Index No. 22,146/1972, Sup. Ct. (N.Y. Co. Spec. Term Pt. I) January 1, 1973.

The second action, brought after defendant abandoned its merger plan, sought expenses, damages and counsel fees. Except for awarding counsel fees, this request was denied. Index No. 22,146/1972, Sup.Ct. (N.Y. Co. Spec. Term Pt. I) March 20, 1973. Plaintiffs appealed both rulings and the Appellate Division affirmed. 42 A.D. 2d 890 (1973). The Court of Appeals dismissed plaintiffs' further appeal. 33 N.Y.2d 1004 (1974).

Memorandum of Decision and Order of Mishler, C.J.

Plaintiffs now bring this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, challenging the constitutionality of section 623 and of defendant's refusal to pay them pursuant to this section. Plaintiffs have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants have moved to dismiss the complaint, under Rule 12(b)(6), on the ground that it fails to state a claim on which relief can be granted.¹⁴ For reasons set forth below, defendant's motion to dismiss is granted.

Since the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883), it has been recognized that the fourteenth amendment and section 1983 as well,¹⁵ apply only to actions of states, and not to actions which are private. To proceed with a section 1983 action therefore, it is first necessary to establish that the deprivation complained of was carried

¹⁴ Defendant has also cross-moved for summary judgment. However, the determinations made by the Court regarding plaintiffs' claim make it unnecessary to consider this motion.

¹⁵ The state action requirement of the fourteenth amendment has been interpreted to be equivalent to the "under the color of law" provision of section 1983. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n. 7, 90 S.Ct. 1598 (1970); United States v. Price, 383 U.S. 787, 794-95, n. 7, 85 S.Ct. 1152 (1966).

Memorandum of Decision and Order of Mishler, C.J.

out under color of state law, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972). To satisfy this requirement a party must demonstrate that the state or its agents participated in or in some fashion encouraged the allegedly unconstitutional action. Id., Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970).

Plaintiffs assert that state action is present in this case because the state, through enactment of section 623, directly enabled defendant to deprive the plaintiffs of a valuable property right. Specifically, plaintiffs maintain that shareholder status and the right to reimbursement are property interests protected by the due process clause of the fourteenth amendment and section 623(e) deprived them of these property rights without due process of law.

From plaintiffs' complaint and accompanying motion papers it is evident that the sole basis presented for alleging state action is the fact that the state has legislated in this area. In the recent decision Shirley v. State National Bank of Connecticut, 493 F.2d 739 (2d Cir. 1974) the Court of Appeals for the Second Circuit considered a very similar argument. In that case, appellant attacked the repossession of her car as unconstitutional. Although

Memorandum of Decision and Order of Mishler, C.J.

the repossession was carried out by the appellee bank, appellant argued that there was state action because the repossession was authorized by statute. (Section 42-98(a) Conn. Gen. Rev. Stat.) The court found that passage of this statute was essentially neutral and did not sufficiently involve the state in the activities of the bank as to create a basis for finding state action. Id. at 744-45.

Since the enactment of section 623 constitutes the sole basis for plaintiffs' claim of state action in this case, Shirley appears to mandate a finding of no state action. Plaintiffs strenuously assert, however, that the present case is different from Shirley, because unlike the statute involved in that case, section 623 significantly alters the common law rights of dissenting stockholders. Plaintiffs conclude from this fact that the state has not been neutral, but has instead affirmatively involved itself in the alleged deprivation. Therefore, they maintain, state action is present.

Plaintiffs' conclusion is overly simple. The fact that the law under attack creates, rather than codifies common law rights is not determinative of the state action issue. Shirley v. State National Bank of Connecticut, supra,

Memorandum of Decision and Order of Mishler, C.J.

at 746, (Kaufman, C.J., dissenting) and authorities cited therein. Rather, it is only by sifting facts and weighing circumstances that the involvement of the state can be attributed its proper significance. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856 (1961). Accordingly, it is necessary to examine the statute and the effect that it has had on plaintiffs.

Prior to the enactment of the first appraisal statutes, from which section 623 is derived, a corporation had to obtain the unanimous consent of all shareholders to carry out a merger. When the appraisal statutes were passed, however, the unanimous consent requirement was abandoned. In return, the statute provided dissenting shareholders a means of receiving compensation for their shares. To give corporations more flexibility, while at the same time protecting the rights of dissenters, the statute provided that dissenting shareholders would cede their shareholder status with the filing of their notice of dissent, and would then become monetary claimants against the corporations, their right to payment being contingent only upon the completion of the merger. Anderson v. International Minerals and Chemical Corp., 295 N.Y. 343 (1946).

Memorandum of Decision and Order of Mishler, C.J.

It is apparent from this description that the change in common law rights affected by section 623 had no bearing on plaintiffs. Under common law, if the plaintiffs opposed the merger, the merger would be precluded, and plaintiffs would remain as regular shareholders. Here, plaintiffs also opposed the merger, and have also been returned to their status as shareholders. Thus, their position now is virtually the same as it would have been under the common law. It follows that there is no greater degree of state involvement in the activity plaintiffs complaint of here than existed in Shirley. Therefore, there is no state action and the motion to dismiss must be granted.

Beyond the fact that the state action predicate is absent, the claim also fails on the merits. Reduced to its essentials, plaintiffs' claim challenges the constitutionality of the statutory scheme contained in section 623. It is quite clear that this section does not violate the due process clause of the fourteenth amendment. While plaintiffs would obviously prefer that the statute accord them a vested right of compensation for their shares, the failure of the statute to so provide does not even approach the degree of arbitrary or irrational activity which must be present in order to upset the statute. See, e.g.,

Memorandum of Decision and Order of Mishler, C.J.

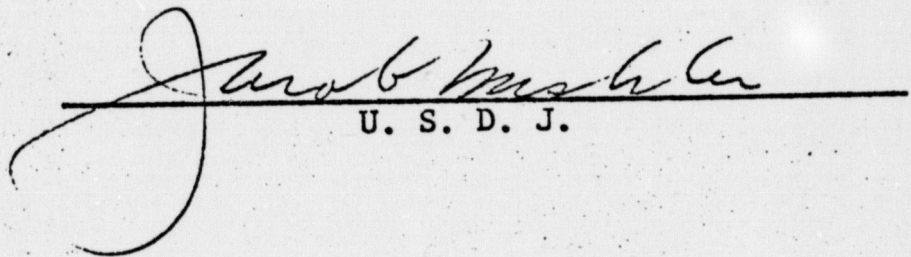
Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970).

Instead, it is clear that section 623 is rationally related to a sound and legitimate state interest, Anderson v. International Minerals and Chemical Corp., supra.

Plaintiffs' motion for summary judgment is denied.
Defendants' motion to dismiss is granted and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs dismissing the complaint.


U. S. D. J.

187a

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
MAURICE GOLDBERG, et al.,

- against -

ARROW ELECTRONICS, INC., and
STATE OF NEW YORK,

Plaintiffs
U.S. DISTRICT COURT E.D. N.Y.
JUDGMENT
74 C 1077
NOV 15 1974
TIME A.M.
Defendants P.M.

-----x
A memorandum of Decision and Order of the Honorable Jacob Mishler, United States District Judge, having been filed on November 13, 1974, the court having determined that state action is absent, and that section 623 of the Business Corporation Law of New York is constitutional, and denying the plaintiffs' motion for summary judgment and granting the defendants' motion to dismiss and directing the Clerk to enter judgment in favor of the defendants and against the plaintiffs, it is

ORDERED and ADJUDGED that judgment is entered in favor of defendants, Arrow Electronics, Inc. and State of New York and against the plaintiffs that the complaint is dismissed.

Dated: Brooklyn, New York
November 15, 1974

Lewis Angel
Clerk

BUSINESS CORPORATION LAW
OF THE STATE OF NEW YORK

§ 623. Procedure to enforce shareholder's right to receive payment for shares.—(a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a statement that he intends to demand payment for his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.

(b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any who voted for or consented in writing to the proposed action.

(c) Within twenty days after the giving of notice to him, any shareholder to whom the corporation was required to give such notice and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations) shall file a written notice of such election to dissent within twenty days after the giving to him of a copy of the plan of

merger or an outline of the material features thereof under section 905.

(d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.

(e) Upon filing a notice of election to dissent, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time before an offer is made by the corporation, as provided in paragraph (g), to pay for his shares. After such offer, withdrawal of a notice of election shall require the written consent of the corporation. If a notice of election is withdrawn, or the proposed corporate action is abandoned or rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the filing of his notice of election, including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution or, if any such rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.

(f) At the time of filing the notice of election to dissent or within one month thereafter the shareholder shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder who fails to submit his certificates for such notation as herein specified shall, at the option of the corpo-

ration exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. Upon transfer of a certificate bearing such notation, each new certificate issued therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had after filing his notice of election.

(g) Within seven days after the expiration of the period within which shareholders may file their notices of election to dissent, or within seven days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value.

If the corporate action has not been consummated upon the expiration of the ninety-day period after the shareholders' authorization date, the offer may be conditioned upon the consummation of such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve-month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve-month period, for the portion thereof during which it was in existence. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates representing such shares.

(h) The following procedure shall apply if the corporation fails to make such offer within such period of seven days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:

(1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.

(2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.

(3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons, and upon each nonresident dissenting shareholder either by registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive.

(4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the pur-

poses of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal. The court may, if it so elects, appoint an appraiser to receive evidence and recommend a decision on the question of fair value. Such appraiser shall have the power, authority and duties specified in the order appointing him, or any amendment thereof.

(5) The final order in the proceeding shall be entered against the corporation in favor of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his shares so determined.

(6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the shareholders' authorization date to the date of payment. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.

(7) The costs and expenses of such proceeding shall be determined by the court and shall be assessed against the corporation, except that all or any part of such costs and expenses may be apportioned and assessed, as the court may determine, against any or all of the dissenting shareholders who are parties to the proceeding if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. Such expenses shall include reasonable compensation for and the reasonable expenses of the appraiser, but shall exclude the fees and expenses of counsel for and experts employed by any party unless the court, in its discretion, awards such fees and expenses. In exercising such discretion, the court shall consider any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer was made by the corporation; and (C) that the corporation failed to institute the special proceeding within the period specified therefor.

(8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates representing his shares.

(i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option:

(1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or

(2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply.

(3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by written notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.

(k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

(l) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).

(m) This section shall not apply to foreign corporations except as provided in subparagraph (e) (2) of section 907 (Merger or consolidation of domestic and foreign corporations). (Amended by L. 1965, Ch. 803.)

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§ 903. Authorization by shareholders

* * *

(b) Notwithstanding shareholder authorization and at any time prior to the filing of the certificate of merger or consolidation, the plan of merger or consolidation may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of merger or consolidation.

§ 910. Right of shareholder to receive payment for shares
upon merger, consolidation or sale, lease, exchange
or other disposition of assets

(a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section, in the following cases:

(1) Any shareholder entitled to vote who does not assent to the taking of an action specified in subparagraphs (A) and (B).

(A) Any plan of merger or consolidation to which the corporation is a party; * * *

STOCK CORPORATION LAW

§ 21. Determination of value of stock of objecting stockholder

In the event that the stockholders of a corporation have taken action pursuant to sections fourteen, twenty, thirty-six, eighty-five, eighty-six or ninety-one and if any stockholder has objected to such action and demanded payment for his stock as provided in section fourteen, section twenty, subdivision nine of section thirty-eight, subdivision seven of section eighty-five, section eighty-seven or section ninety-one, either such stockholder or the corporation may apply upon eight days' notice to the other, within sixty days after such demand, to the supreme court at any special term thereof held in the judicial district in which the office of such corporation is situated, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper. The court may at the time of appointing the appraisers or at any subsequent time direct such stockholder to submit his stock certificate to the clerk of the court for notation thereon of the pendency of the appraisal proceedings, and if such stockholder fails to comply with such direction the court may on motion of the corporation dismiss the proceeding. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and after being duly sworn honestly and faithfully to discharge their duties, they or any two of them shall estimate and certify the value of such stock just prior to the taking of the action to which the objection is made and deliver one copy of their appraisal to such corporation, and another to such stockholder if demanded by him. Either the stockholder or the corporation may apply to the supreme court upon five days' notice for an order confirming or modifying or rejecting the appraisal. If the court confirms or modifies such appraisal it shall award interest on the value of such stock, as determined by such appraisal and as confirmed or modified by the court, from the date of taking the action to which the objection was made, and shall direct the manner in which payment shall be made to such stockholder. Before receiving payment such stockholder shall surrender to the corporation his certificate of stock. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation. The fees and expenses of the appraisers shall be fixed by the court and paid by the corporation. As amended L.1924, c. 441, § 6; L.1934, c. 764, § 3; L.1936, c. 213, § 1; L.1936, c. 778, § 4; L.1939, c. 183, eff. April 1, 1939.

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**Stock Corporation Law—Objecting Stockholders—
Determination of Value of Stock**

CHAPTER 647

An Act to amend the stock corporation law, in relation to the determination of value of stock of objecting stockholders.

Became a law April 14, 1950, with the approval of the Governor.

Effective July 1, 1950.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-one of the stock corporation law, as last amended by chapter eight hundred five of the laws of nineteen hundred forty-nine, is hereby amended to read as follows:

§ 21. Determination of value of stock of objecting stockholder.

1. In the event that the stockholders of a corporation have taken action pursuant to sections fourteen, twenty, eighty-five, eighty-six or ninety-one or pursuant to article four a 1 if any stockholder has objected to such action and demanded payment for his stock as provided in section fourteen, section twenty, subdivision seven of section eighty-five, section eighty-seven, section ninety-one or subdivision eleven of section thirty-eight, as the case may be, either such stockholder or the corporation may apply upon eight days' notice to the other, within sixty days after such demand, to the supreme court at any special term thereof held in the judicial district in which the office of such corporation is situated, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper. The court may at the time of appointing the appraisers or at any subsequent time direct such stockholder to submit his stock certificate to the clerk of the court for notation thereon of the pendency of the appraisal proceedings, and if such stockholder fails to comply with such direction the court may on motion of the corporation dismiss the proceeding. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and after being duly sworn honestly and faithfully to discharge their duties, they or any two of them shall estimate and certify the value of such stock just prior to the taking of the action to which the objection is made and deliver one copy of their appraisal to such corporation, and another to such stockholder if demanded by him. Either the stockholder or the corporation may apply to the supreme court upon five days' notice for an order confirming or modifying or rejecting the appraisal. If the court confirms or modifies such appraisal it shall award interest on the value of such stock, as determined by such appraisal and as confirmed or modified by the court, from the date of taking the action to which the objection was made, and shall direct the manner in which payment shall be made to such stockholder. Before receiving payment such stockholder shall surrender to the corporation his certificate of stock. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation. The fees and expenses of the appraisers shall be fixed by the court and paid by the corporation. The corporation, within ten days after the last day on which a demand for payment might have been made, shall mail by registered mail to such

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objecting stockholder or deliver personally to him a written offer to pay for such stock in cash at a price deemed by the corporation to be the value thereof; and an offer so made to any such objecting stockholder shall also be made on the same terms and conditions and at the same price per share to all such objecting holders of shares of the same class of stock. If mailed, such offer shall be directed to such stockholder at his address as it appears on the stock-book unless he shall have filed with the secretary of the corporation a written request that notices intended for him be mailed to some other address, in which case it shall be mailed to the address designated in such notice. Such offer shall be accompanied by a balance sheet of the corporation as of a date not more than six months prior to the making of such offer and a profit and loss statement for the twelve months' period ended on the date of such balance sheet; provided, that if it is impracticable to furnish a balance sheet as of a date within such six months' period, a balance sheet as of such earlier date as shall be practicable, but not earlier than the end of the corporation's preceding fiscal year, shall be furnished, in which event the profit and loss statement shall be for the twelve months' period ended on the date of such balance sheet.

2. The corporation may apply to the purchase of stock pursuant to an offer made as provided in subdivision one hereof, such of its assets as are lawfully available for the purchase of shares of its stock, and an amount of its capital not exceeding the capital represented by the shares so purchased; provided, that the effect of any such purchase and application of capital thereto shall not be to reduce the actual value of the assets of the corporation to an amount less than the total amount of its debts and liabilities, plus the amount of its capital reduced by the amount of capital so applied. The use of capital to such extent for such purpose shall not be deemed to be the declaration or payment of a dividend or a distribution of assets within the meaning of section fifty-eight of the stock corporation law, or constitute a violation of section six hundred sixty-four of the penal law. The shares of stock so purchased may be held or disposed of by the corporation; provided, that the corporation, by resolution of its board of directors, may retire any shares so purchased, and shall retire any thereof purchased through the application of capital, by filing a certificate entitled "Certificate of reduction of capital of (name of corporation) pursuant to section twenty-one of the stock corporation law". Such certificate shall contain the statements prescribed in section thirty-six for certificates under subdivision two and subdivision four of section thirty-five to effect a reduction of capital and the elimination of previously authorized shares, and the reduction of capital stock in conformity therewith. Such certificate shall be subscribed and acknowledged by the president or a vice-president and the secretary or an assistant secretary who shall make and annex an affidavit that they have been authorized to execute and file such certificate by resolution of the board of directors, adopted at a directors' meeting duly called and held on a date specified in such affidavit. There shall be annexed to such certificate an affidavit of the president or a vice-president and also an affidavit of the treasurer or a majority of the directors stating that the actual value of the assets

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of the corporation is not less than the total amount of the debts and liabilities of the corporation plus the proposed amount of its capital. Such certificate shall be filed as provided in section thirty-eight in respect of certificates under section thirty-six. Upon the filing of such certificate the shares so purchased shall be eliminated from the authorized capital stock or number of shares of the corporation, and the capital of the corporation shall be reduced by an amount equal to the amount of capital represented by the shares so retired. The capital of the corporation represented by any shares of stock purchased or otherwise acquired by it pursuant to any provision of this section shall be determined as provided in paragraph two of section twenty-eight.

3. If the corporation shall fail to make an offer within the time specified in subdivision one hereof, or if the objecting stockholder shall fail to accept an offer from the corporation within twenty days after the mailing or delivery thereof, either such stockholder or the corporation may petition the supreme court, at any special term thereof held in the judicial district in which the principal office of the corporation is situated, to determine the value of such stock. Such petition shall be made on five days' notice and shall be made returnable in such court on the fiftieth day after the last day on which the demand of the objecting stockholder for payment might have been made, or, if the rules or practice of such court do not permit such petition to be made returnable on such fiftieth day, then it shall be made returnable on the first succeeding day permitted by such rules or practice. If more than one such proceeding shall have been instituted, the court, in its discretion, may, or on motion of the corporation shall, enter an order directing the consolidation of all proceedings and making such directions with respect to the conduct of the consolidated proceeding as it shall deem proper. Two or more objecting stockholders may join or be joined in any such proceeding.

4. The court shall determine which of the objecting stockholders have complied with the provisions of section fourteen, section twenty, subdivision eleven of section thirty-eight, subdivision seven of section eighty-five, section eighty-seven or subdivision seven of section ninety-one, whichever shall be applicable, and thereby become entitled to have the value of their stock determined. If the court shall find that any of the objecting stockholders are so entitled, it shall proceed to determine the value of their stock, or shall appoint an appraiser to determine such value, and may make such directions in regard to the proceeding as it shall deem proper. If the court shall determine such value without appointing an appraiser, judgment shall be entered against the corporation and in favor of each objecting stockholder party to the proceeding for the value of his stock so determined. If an appraiser shall be appointed, he shall be duly sworn honestly and faithfully to discharge his duties and thereupon shall proceed to determine the value of such stock, considering all relevant legal evidence which may be produced, and shall cause a stenographic transcript of the testimony to be taken. For all the purposes of this section, such value shall be determined as of the close of business on the day before the taking of the stockholders' vote on the action to which objection was made, ex-

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declaring any appreciation or depreciation directly or indirectly consequent upon such action, or the proposal thereof. The appraiser may require any person to attend before him as a witness, and shall have the same powers with respect to all proceedings before him as are conferred upon a person authorized by law to hear, try or determine a matter in relation to which proof may be taken. The appraiser's report shall state his conclusion as to the value of the stock and his reasons therefor, and he shall file such report, together with the transcript of testimony and all exhibits which shall have been offered, with the court within sixty days after his appointment, or within such later period as the court may direct, and shall serve one copy of the report by mail on each party to the proceeding. The court shall consider the report in the light of all the relevant legal evidence and, on motion of any party to the proceeding, shall enter an order confirming, modifying or rejecting the same and, if confirming or modifying, directing the time within which payment shall be made. If the appraiser's determination of value be confirmed or modified by such order, judgment shall be entered thereon against the corporation and in favor of each objecting stockholder party to the proceeding for the value of his stock so determined. If the appraiser's determination of value be rejected, the court in its discretion (a) may determine the value of the stock of the objecting stockholders in the light of all the relevant legal evidence, in which event judgment shall be entered on such determination as in the case of judgment entered upon an order confirming an appraiser's determination of value, or (b) may remit the proceeding to the appraiser, making such directions with respect to further proceedings as may be deemed proper. Any judgment for the value of stock entered under this subdivision shall include interest from the date of the stockholders' vote on the action to which objection was made; provided, that it, taking into consideration the price which the corporation may have offered to pay for such stock, the financial statements furnished to the stockholder, and such other circumstances as the court may deem relevant, the court shall find that the action of the stockholder in failing to accept such offer was arbitrary and vexatious or not in good faith, no interest shall be allowed. The payment of any such judgment shall not be deemed to be the declaration or payment of a dividend or a distribution of assets within the meaning of section fifty-eight of the stock corporation law, nor constitute a violation of section six hundred sixty-four of the penal law.

5. The costs and expenses of the proceeding shall be determined by the court and shall be assessed against the corporation; provided, that all or any part of such costs and expenses may be apportioned and assessed as the court may deem equitable against any or all of the objecting stockholder parties to the proceeding to whom the corporation shall have made an offer to pay for the stock if, taking into consideration the value of the stock as determined in the proceeding, the financial statements furnished to such stockholders, and such other circumstances as the court may deem relevant, the court shall find that the action of such stockholders in failing to accept such offer was arbitrary and vexatious or not in good faith. Such expenses

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shall include reasonable compensation to and the reasonable expenses of the appraiser but shall exclude the fees and expenses of counsel and of experts retained by any party; provided, that if the value of the stock as determined in the proceeding shall materially exceed whatever amount the corporation may have offered to pay therefor, or if no offer shall have been made, the court, in its discretion, may award to any stockholder party to the proceeding such sum as the court may determine to be reasonable compensation to any expert or experts retained by such stockholder in the proceeding if the court shall find the retaining of such expert or experts to have been reasonably necessary.

6. Any stockholder demanding payment for his stock shall have no right to receive any dividends or distributions payable to holders of such stock of record after the close of business on the day next preceding the date of the stockholders' vote in favor of the action to which such objection was made, and upon such vote shall cease to have any other rights of a stockholder of the corporation with respect to such stock, except the right to receive payment for the value thereof as in this section provided; and no such demand may be withdrawn unless the corporation shall consent thereto. If, however, such demand shall have been withdrawn upon such consent, or if no petition for the appointment of an appraiser to determine the value of the stock of such stockholder shall have been made within the time herein provided, or if a court of competent jurisdiction shall determine that such stockholder is not entitled to the relief by this section provided, or if the action to the taking of which objection was made shall be abandoned or rescinded, the status of such stockholder as a stockholder in the corporation thereupon shall be restored, without prejudice, however, to any corporate proceedings which may have been taken during the interim; provided, that such stockholder shall thereupon be entitled to receive any dividends, distributions or other rights to which he would have been or would have become entitled had he not demanded payment for his stock.

7. The corporation shall not be required to make payment for the stock of any objecting stockholder as in this section provided unless, simultaneously, the certificate or certificates representing such stock shall be surrendered to it, duly indorsed in blank and in proper form for transfer, accompanied by evidence of payment of all requisite stock transfer taxes; and any judgment entered pursuant to this section shall so provide. Upon receipt of such payment, the objecting stockholder shall cease to have any interest in the corporation or its assets by reason of his ownership of the stock so paid for, and such stock may be held or disposed of by the corporation; provided, that if payment for the stock of an objecting stockholder shall have been demanded in consequence of action taken on a merger or consolidation pursuant to sections eighty-five, eighty-six or ninety-one, the shares or other securities of the resulting or surviving corporation into which the shares of the objecting stockholder would have been converted had no objection been made shall, unless the certificate of merger or consolidation shall otherwise provide, be deemed to have

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... duly issued in accordance with the terms of such certificate and reacquired by the resulting or surviving corporation, and may be held or disposed of by it free of any preemptive rights of stockholders. The corporation, by resolution of its board of directors, may retire any shares of stock acquired by it upon the payment of a judgment for the value thereof, by filing a certificate as provided in subdivision two hereof for the retirement of shares purchased pursuant to an offer; except, that the affidavits of the president or a vice-president and of the treasurer or a majority of the board of directors, specified in the said subdivision two, relative to the actual value of the assets of the corporation, shall not be required. Upon the filing of such certificate the shares so acquired shall be eliminated from the authorized capital stock or number of shares of the corporation, and the capital of the corporation shall be reduced by an amount equal to the amount of capital represented by the shares so retired.

8. Within twenty days after the last day on which a demand for payment might have been made, each stockholder demanding payment, unless the offer of the corporation to pay therefor shall have been accepted, shall submit his stock certificate or certificates to the corporation for notation thereon of the fact of such demand; and any stockholder who shall fail so to do shall not be entitled to the relief by this section provided unless a court of competent jurisdiction, for good and sufficient cause shown, shall otherwise direct. Upon any subsequent transfers of such stock on the books of the corporation prior to payment by the corporation of the value thereof, as herein provided, the new certificate or certificates issued therefor shall bear a similar notation, together with the name of the original objecting holder of such stock, and, until such payment shall have been made, no transferee of any such stock shall acquire any rights of any character whatsoever by reason thereof except the rights of the original objecting stockholder.

9. In any case where the action with respect to which objection was made shall have been taken with, or authorized by, the consent of stockholders without a meeting, the actual date upon which the written consent to such action is first obtained from the requisite number of stockholders, or, in case such action shall have been taken pursuant to section eighty-five of the stock corporation law, the date of filing the certificate of ownership as in such section provided, shall for all purposes be deemed to be the date of the stockholders' vote referred to in subdivisions four and six of this section.

§ 2. Section twenty-one of the stock corporation law as hereby amended shall apply to the determination of the value of the stock of objecting stockholders in all cases where payment for such stock is demanded by reason of the fact that the stockholders of a corporation, after this act shall take effect, have authorized action pursuant to sections fourteen, twenty, eighty-five, eighty-six or ninety-one or pursuant to article four; but the provisions of section twenty-one as at present in force shall apply to the determination of the value of such stock in all cases where payment therefor is or has been demanded by reason of the fact that the stockholders of a corporation prior to the time this act shall take effect have authorized any such action.

§ 3. This act shall take effect July first, nineteen hundred fifty.

Service of one copy
of the within Appendix
is admitted.

~~JANUARY RECEIVED~~

DATE 1/31/75 HOUR 2 PM

Nickerson, Kramer, Lowenstein, Nesson, Kamin & S.

by S. Fisher

~~attorneys for Appellee~~